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# PURSUING SETTLEMENT IN AN ADVERSARY CULTURE: A TALE OF INNOVATION CO-OPTED OR "THE LAW OF ADR"

CARRIE MENKEL-MEADOW\*

## I. INTRODUCTION

IN this Article I tell a tale of legal innovation co-opted. Put another way, this is a story of the persistence and strength of our adversary system in the face of attempts to change and reform some legal institutions and practices.<sup>1</sup> In sociological terms, it is an ironic tale of the unintended consequences of social change and legal reform. A field that was developed, in part, to release us from some—if not all—of the limitations and rigidities of law and formal legal institutions has now developed a law of its own. With burgeoning developments in the use of nonadjudicative methods<sup>2</sup> of dispute resolution in the courts

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I also would like to express my appreciation to my hosts (both faculty and students) and Law Review editors at the Florida State University College of Law, whose company and patience I have enjoyed for two years in a row.

1. The attempts at innovation discussed in this Article are responsive to a wide range of criticisms about the legal system and its practices, from the "caseload explosion," see, e.g., Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976); Manning, *Hyperlexis: Our National Disease*, 71 Nw. U.L. REV. 767 (1977), to discovery abuse, see Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978), to the behavior of lawyers, see Adams, *The Legal Profession: A Critical Evaluation*, 74 JUDICATURE 77 (1990), to the quality of resolution of legal disputes, whether in the context of adjudication or private settlement, see, e.g., Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

2. Terminology and categorization are very problematic in this field. I use the term "non-adjudicative" methods to distinguish them from the "ideal type" of court trial, but in fact many ADR methods are adjudicatory—such as arbitration, so-called "med-arb," and other hybrid variations on these primary themes. See generally S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).

and elsewhere,<sup>3</sup> issues about alternative dispute resolution (ADR) increasingly have been "taken to court." As a result, we are beginning to see the development of case and statutory law and, dare I say, a "common law" or "jurisprudence" of ADR.

In this Article, I review some of the conflicting impulses and purposes behind the ADR movement and trace how that movement has been affected by some of the legitimacy handed to it by its assimilation into the court system. I review a few of the recent cases that have begun to explore the legal issues implicated by the use of alternative methods of dispute resolution.<sup>4</sup> My purpose is not to review the case law for doctrinal understanding, but to try to unravel and understand the processes of institutional and social change and legal reform. In the case of ADR, different themes of emphasis have been differentially heard and some goals have been advanced over others. Thus, in a bigger and more political sense, this is a tale of how power and control are asserted in the legal system, how competing values and counter-cultural challenges are interpreted, controlled, and assimilated within powerful cultural constructs.

For me personally, it is the continuation of a story that informs my scholarly and teaching life—how the "ideal type" of adversarial litigation structures, and frequently distorts, the processes and outcomes of good legal solutions. In earlier work, I have explored how lawyer behavior modeled on adversary practices may distort the achievement of good negotiated settlements<sup>5</sup> and how judicial settlement conduct may or may not facilitate quality solutions to legal problems.<sup>6</sup> In this Article, I explore the larger institutional issues presented when lawyers, judges, and parties to a conflict come together to resolve dis-

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3. Like many others who write about alternative dispute resolution (ADR), in this Article I separate the "public" uses of ADR within the court system (here mostly federal) from the private arena. Some of the issues apply to both arenas and many critics are concerned with the blurring of the two. See generally Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). I share some of the concerns about the "privatization" of the dispute resolution mechanisms in our society, see *infra* notes 124-55 and accompanying text; see generally Garth, *Privatization and the New Formalism: Making Courts Safe for Bureaucracy*, 13 LAW & SOC. INQUIRY 157 (1988), but I will leave some of these issues for exploration at a later date. Whatever the pitfalls of some private dispute resolution systems, parties have always been free, within certain limits, to devise and use their own forms of dispute resolution in our party-initiated legal complaint system.

4. In this context, "alternative" refers to methods of handling disputes through means other than the adversarial trial method.

5. See generally Menkel-Meadow, *supra* note 1.

6. See Menkel-Meadow, *For and Against Settlement: The Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 (1985).

putes using new forms within old structures. As a proponent of a particular version of ADR—the pursuit of “quality” solutions—I am somewhat troubled by how a critical challenge to the status quo has been blunted, indeed co-opted, by the very forces I had hoped would be changed by some ADR forms and practices. In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice. Lawyers may use ADR not for the accomplishment of a “better” result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage. Legal challenges cause ADR “issues” to be decided by courts. An important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the transformations proponents of ADR would like to see in our disputing practices.

The issues which are implicated in this inquiry are jurisprudentially important. These issues extend well beyond the current scholarly and professional debates about ADR and settlement.<sup>7</sup> The issues are those

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7. For critiques of some of the ADR developments, see generally 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* (R. Abel ed. 1982) [hereinafter *THE AMERICAN EXPERIENCE*]; 2 *THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES* (R. Abel ed. 1982); C. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Brunet, *supra* note 3; Coleman & Silver, *Justice in Settlements*, 4 SOC. PHIL. & POLICY 102 (Autumn 1986); Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984); Edwards, *supra* note 3; Fine-man, *Dominant Discourse: Professional Language and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727 (1988); Fiss, *supra* note 3; Galanter, *The Quality of Settlements*, 1988 J. DISPUTE RESOLUTION 55; Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Guill & Slavin, *Rush to Unfairness: The Downside of ADR*, 28 JUDGE'S J. 8 (Summer 1989); Hay, Carnevale & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 JUST. SYS. J. 228 (1984); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Luban, *The Quality of Justice*, 66 DEN. U.L. REV. 381 (1989); McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833 (1990); Nader, *Disputing Without the Force of Law*, 88 YALE L. J. 998 (1979); Nader, *The Recurrent Dialectic Between Legality and its Alternatives: The Limits of Binary Thinking*, 132 U. PA. L. REV. 621 (1984); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984); Silbey & Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DEN. U.L. REV. 437 (1989); White, *The Pros and Cons of Getting to Yes* (Book Review), 34 J. LEGAL EDUC. 115 (1984); Woods, *Mediation: A Backlash to Women: Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 31 (1985); Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L.

which have informed the value debates about our systems of procedure<sup>8</sup> since we, as an Anglo-American system of law, have developed our forms and processes of justice.<sup>9</sup> Thus, the debates about ADR and the legal resolutions of important policy and procedural issues affect not only ADR, but the legitimacy of the entire legal process. As the issues raised about ADR begin to wind their way through the courts, we can begin to examine the underlying jurisprudential and policy issues implicated in these decisions. Here are some of the issues that are raised by these recent developments:

1. What are the values of settlement and of adjudication?
2. When is a court not a court? What makes a court a "special" institution and what should it be doing?<sup>10</sup> Related to these concerns are issues of legal authority for the variations on court adjudication—when can a court "order" someone to settle, require a juror to serve a nonjuror function, or exclude the public from a proceeding?
3. What values should a court-institutionalized ADR device serve? Who should pay?<sup>11</sup> Who should have access? What are the conse-

L. REV. 341 (1990).

For some arguments supporting various forms of ADR, or reactions to the previous critiques, see Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303; Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U.L. REV. 335 (1989); Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989); Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Menkel-Meadow, *supra* notes 1 & 6; Norton, *Justice and Efficiency in Dispute Systems*, 5 OHIO ST. J. DISPUTE RESOLUTION 207 (1990); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (1978); *Alternative Dispute Resolution*, 37 U. FLA. L. REV. 1 (1985); *Quality of Dispute Resolution*, 66 DEN. U.L. REV. 335 (1989).

In addition, several new journals currently publish material relevant to ADR generally, such as MEDIATION QUARTERLY, NEGOTIATION JOURNAL, MISSOURI JOURNAL OF DISPUTE RESOLUTION, and OHIO STATE JOURNAL OF DISPUTE RESOLUTION.

This list of sources is not exhaustive; it is illustrative only and does not report on the empirical and evaluative literature of specific programs of dispute resolution. See generally Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DEN. U.L. REV. 499 (1989).

8. See generally R. COVER, O. FISS & J. RESNIK, *PROCEDURE* (1988); R. COVER & O. FISS, *THE STRUCTURE OF CIVIL PROCEDURE* (1983); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

9. These forms and processes include issues about efficiency, fairness, notice, access, forms of proof, and task allocation (party initiated and adversarial).

10. See generally M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

11. Several important legal organizations have recently considered the issue of who should

quences of using ADR devices for the rest of the system? When should a "public" system "subsidize" private agreements?

4. What are the politics of ADR? Are there patterns of usage? Do particular kinds of clients choose different processes? Are there differences between big cases and small cases, or in the choices of wealthy clients and poorer clients?

5. What should be the system or values implicated in case allocation—should it be a free market? Should there be restrictions or regulations of case types? Should these programs be voluntary or mandatory?

6. How can we measure the effects of different allocations or assignments to particular processes? How should we measure the "quality" of justice?<sup>12</sup>

7. What processes are appropriate within our system of dispute resolution? When is adversarialness appropriate, and when is it not? What other processes can be used while preserving our long tradition of process-fairness and rights protections?

8. On what bases should cases be settled, decided, or tried—by considering only legal rules, personal needs, or economic expediency?

These are some of the issues that form the backdrop of competing visions and values that courts are beginning to address as "new" forms of ADR come into use within the courts and litigants begin to use the full arsenal of traditional legal and adversarial practices to challenge them. Some of these questions raise policy choices that cannot yet be answered with the weak empirical base we have. Thus, I will conclude by asking more questions and by suggesting that our needs are for more data and study before we can hope to answer these questions sensibly. The major question I wish to explore here is whether new forms of dispute resolution will transform the courts or whether, in a more likely scenario, the power of our adversarial system will co-opt and transform the innovations designed to redress some, if not all, of our legal ills. Can legal institutions be changed if lawyers and judges persist in acting from traditional and conventional conceptions of their roles and values?

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pay for public ADR. See generally American Civil Liberties Union, Special Committee on Alternative Dispute Resolution, Minutes of March 9, 1991 Meeting (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.); Society of Professionals in Dispute Resolution, Law and Public Policy Committee, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (Jan. 1991) (unpublished report).

12. See generally *Quality of Dispute Resolution*, *supra* note 7, at 355; Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DEN. U.L. REV. 419 (1989).

## II. WHY PURSUE SETTLEMENT?

In what has become a commonly recognized division in the literature and advocacy about ADR, we see two basically different justifications for processes that resolve cases short of trial—what I call quantitative-efficiency claims versus qualitative-justice claims.<sup>13</sup> These different conceptions of the purposes of ADR represent vastly different ideologies and perspectives on how disputes should be resolved in our society. Although efficiency has become the more prominent concern,<sup>14</sup> I believe the “quality of justice” proponents actually came first in very recent history.<sup>15</sup> In the 1960s, as part of several other social movements advocating more democratic participation in our various social institutions,<sup>16</sup> a variety of groups<sup>17</sup> urged that dispute resolution should more fully involve the participants in disputes. This would allow individuals to make their own decisions about what should happen to them. Thus, a model of community empowerment, party participation, and access to justice was championed by those concerned with substantive justice and democratic process. This “movement” resulted in the funding and support of “neighborhood justice centers”<sup>18</sup> and a variety of more indigenous community dispute resolution centers<sup>19</sup>—many of these justified on the grounds of increased participation and access to justice.

13. See S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 2, at 2 (1985); Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1147 (1990). See generally Brunet, *supra* note 3; Galanter, . . . *A Settlement Judge, Not a Trial Judge* 12 J. L. & Soc. 1 (1985); Menkel-Meadow, *supra* note 1; Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, (Book Review) 69 JUDICATURE 300 (1986); *Quality of Dispute Resolution*, *supra* note 7.

14. Efficiency has become more prominent in part because of who is associated with each of the claims. For example, Silbey and Sarat identify the different perspectives on ADR by who the promoters are so that the justifications here labeled “efficiency” are, in their views, the claims of the Establishment Bar and Legal Elites. See generally Silbey & Sarat, *supra* note 7.

15. For a more extended history of alternative dispute resolution in the United States, see generally J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

16. See generally Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in NEIGHBORHOOD JUSTICE—ASSESSMENT OF AN EMERGING IDEA 60 (R. Tomasic & M. Feeley eds. 1982); Shonholtz, *The Citizen's Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS 42 (1987); Singer, *Non-judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979).

17. These groups ranged from civil rights groups to consumer advocates.

18. Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in THE AMERICAN EXPERIENCE, *supra* note 7, at 75. See generally D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (Nat'l Inst. L. Enforcement & Crim. Just. No. J-LEAA-030-76, 1977); McGillis, *supra* note 16.

19. Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in THE AMERICAN EXPERIENCE, *supra* note 7, at 207.

Others, like myself, have argued that outcomes derived from our adversarial judicial system or the negotiation that occurs in its shadows<sup>20</sup> are inadequate for solving many human problems.<sup>21</sup> Our legal system produces binary win-lose results in adjudication. It also produces unreflective compromise—"split the difference" results in negotiated settlements that may not satisfy the underlying needs or interests of the parties.<sup>22</sup> Human problems become stylized and simplified because they must take a particular legal form for the stating of a claim.<sup>23</sup> Furthermore, the "limited remedial imagination" of courts in providing outcomes<sup>24</sup> restricts what possible solutions the parties could develop.<sup>25</sup> Some of us have argued that alternative forms of dispute resolution, or new conceptualizations of old processes, could lead to outcomes that were efficient in the Pareto-optimal sense<sup>26</sup> of making both parties better off without worsening the position of the other. In addition, the processes themselves would be better because they would provide a greater opportunity for party participation and recognition

20. See Mnookin & Kornhauser, *supra* note 1. Marc Galanter calls the game of lawsuits "litigotiation," a continuous process of negotiation, adjudication, and their subparts that influence each other. Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984). See generally Galanter, *Litigation*, in LAW AND THE SOCIAL SCIENCES 151 (L. Lipson & S. Wheeler eds. 1986).

21. See generally R. FISHER & W. URY, *GETTING TO YES* (1985); Menkel-Meadow, *supra* note 1.

22. For a fuller discussion of the limits of and problems with compromise, see H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 35-65 (1982); Menkel-Meadow, *supra* note 1, at 770-75. See generally *COMPROMISE IN ETHICS, LAW AND POLITICS* (J. R. Pennock & J. Chapman eds. 1979).

23. For example, a claim may have to be brought as a tort or contract action, rather than as a "business" problem.

24. For example, certain actions require certain remedies—only damages or injunctions might be permitted in a particular case. Menkel-Meadow, *supra* note 1, at 790.

25. Obviously, one of the advantages of settlement is that the parties can be more flexible in their private settlement agreements than they could be in court. However, as I argued in Menkel-Meadow, *supra* note 1, all too often the parties are limited in their conceptions of settlement solutions by what the court will permit. Most economists or economics-minded writers assume that the adjudicated result is what should set the baseline for evaluating negotiated results. See generally Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Mnookin & Kornhauser, *supra* note 1. From my perspective, the "bargaining endowments" of legal rules and court decisions are only one source of baseline measurement of the "quality" of solutions. A much more difficult jurisprudential issue is how to evaluate "quality" Pareto-optimal solutions for the parties that, in particular cases, may depart from the law. A number of writers on the settlement process find something philosophically wrong with results that do not track our legal rules. See generally Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985); Luban, *supra* note 7; Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985).

26. See H. RAIFFA, *supra* note 22, at 139; Menkel-Meadow, *supra* note 1, at 768-75.



of party goals.<sup>27</sup> Thus, the "quality" school includes both elements of process and substantive justice claims.<sup>28</sup> Some of the arguments here have been supported by the jurisprudential and anthropological work of those studying the different structures that human beings have developed in response to different disputing functions.<sup>29</sup>

In the mid-to-late 1970s, shortly after the first claims for a different form of justice, Chief Justice Warren Burger and other judicial administrators began to comment on the work load of the federal and state courts, and to lament the litigation explosion.<sup>30</sup> They began to advocate the use of alternative methods of dispute resolution—mediation, arbitration, and others—for the purpose of reducing caseloads and processing cases more quickly.

Similarly, in the early 1980s an active group of major corporate counsel began to focus on the high costs of litigation and participated in the founding of an organization devoted to supporting a variety of ADR devices. The goal of this organization, the Center for Public Resources (CPR),<sup>31</sup> is to reduce the legal costs of disputes for the nation's major businesses.<sup>32</sup>

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27. For more extended elaboration, see sources cited *supra* note 21.

28. Some writers have mistakenly characterized the "quality" issues as primarily interpersonal or relational. Silbey and Sarat assert that those interested in promoting "quality" forms of ADR are concerned with disputes involving ongoing relationships (including business and property as well as familial or social), or they seek to "therapize" the dispute resolution process by substituting interpersonal processes for the clarification of legal rights. See Silbey & Sarat, *supra* note 7, at 444, 454; see also Silbey & Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19-35 (1986). As noted above, the "quality" arguments include both of the processual dimensions—how the process might be conducted and how the parties might relate to each other. Of equal, or to some greater concern, is the outcome. Such an outcome measure of the quality of a settlement has to do as much with the substance of the dispute as with the personalities of the disputants. To borrow a simple phrase from Fisher and Ury (with which I don't entirely agree), the substantive problem must often be separated from the people. R. FISHER & W. URY, *supra* note 21, at 17.

29. These responses occur in our own culture as well as others. See generally L. NADER & H. TODD, *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* (1978); Fuller, *Mediation—Its Form and Functions*, 44 S. CAL. L. REV. 305 (1971); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

30. See generally Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982); Burger, *supra* note 1; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

31. The Center for Public Resources (CPR) was founded in 1979, with support from private foundations and memberships of in-house and firm counsel of Fortune 500 companies. The Center is based in New York and performs a wide variety of activities to promote the use of ADR both in the private sector and in the courts. These activities include education, publication, conferences, consultation, and recommendations for neutral dispute resolvers.

32. There is actually an interesting story to be told here about the relation of in-house counsel seeking to reduce the costs of litigation, at the likely expense of "out-of-house" large-firm counsel, to participation by both groups in the founding of CPR. By 1990, close to 500 of the

Many scholars, including myself, have studied and written about the claims of ADR to speed case-processing. For the most part, we have found them wanting,<sup>33</sup> although the ever-changing target of court innovations makes rigorous and comparable study almost impossible.

From yet a third perspective, law and economics scholars study the efficiency of settlement not from the perspective of a court, but from the perspective of the parties to determine when settlement is "rational" and "efficient." The purpose is to develop predictive rules that lead to further efficiency by making it clear when settlement

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largest U.S. corporations had signed a CPR "Pledge" to pursue some form of ADR in disputes with each other, but not with nonsignatories, who would include virtually all individuals disputing with member and nonmember corporations. CPR members are currently debating a similar "pledge" to be signed by major law firms.

33. See generally S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Federal Judicial Center No. FJC-R-77-G-1, 1977); M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964); Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166 (1978); Hensler, *What We Know and Don't Know About Court-Annexed Arbitration*, 69 JUDICATURE 270 (1986); Menkel-Meadow, *supra* note 6. More recent studies are beginning to show some case-processing effects, and they also demonstrate generally high satisfaction rates among users. See generally J. ADLER, D. HENSLE & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983); E.A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center No. FJC-R-83-4, 1983); E.A. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLE, J. RESNIK, & T. TYLER, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (RAND Inst. for Civ. Just. No. R-3708-ICJ, 1989); MEDIATION RESEARCH (K. Kressel & D. Pruitt eds. 1989); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11 (1984); McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); Norton, *supra* note 7. This note is only a partial listing of some of the empirical studies of a wide variety of ADR processes, which are not comparable and may have differing effects. These processes include arbitration and court-sponsored mediation, see generally K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (Federal Judicial Center 1984), summary jury trials, see generally J. ALFINI, L. GRIFFITHS, R. GETCHELL & D. JORDAN, SUMMARY JURY TRIALS IN FLORIDA: AN EMPIRICAL ASSESSMENT (1989), small claims innovations, see generally Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and An Empirical Evaluation*, 18 LAW & SOC. REV. 515 (1984), and neighborhood justice centers, see generally McGillis, *supra* note 16. Despite the efforts of Esser to create a bibliography of evaluation studies of ADR, there is as yet no literature which synthetically summarizes the widely divergent studies which attempt to address the issues of the "efficiency" or effectiveness of court-sponsored ADR. See generally Esser, *supra* note 7. As difficult a task as this is for public court-sponsored programs, it will be even more difficult to address in evaluating the effectiveness of ADR innovations in the private sphere, at least with rigorous social scientific controls.

A slightly older body of work has addressed itself to the measurement of process and procedural preferences of disputants. See generally J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); Walker, LaTour, Lind & Thibaut, *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOLOGY 295 (1974). See also the more recent work of A. LIND & T. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

makes sense.<sup>34</sup> By creating predictive models, we know that parties should settle if their expectations of recovery or loss<sup>35</sup> minus the transaction costs are within a "zone of agreement." In economic terms, the difficulties are in making these calculations under conditions of imperfect information, uncertainty, and risk. Thus, the bargaining process is one in which the rational person attempts to obtain information about the law while considering the other parties' preferences. The person must then assess the probabilities of recovery and determine the risk aversion of each party. Even economists recognize, however, that the dispute resolution system performs two functions—it resolves disputes for the parties, and it provides public "authoritative" rules for society.<sup>36</sup> In this way, the "efficiency" of a settlement can be assessed on both micro and macro levels.<sup>37</sup> Too much settlement might result in fewer clear-cut rules, thereby clouding probability assessments and leading to more trials.<sup>38</sup> This view of settlement has begun to influence the law of ADR as several of the law and economics scholars have found their places on the bench.<sup>39</sup>

The crucial point here is that different constituencies have pursued settlement or ADR for vastly different reasons—cheaper and faster is not necessarily the same thing as better. Those different reasons have

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34. For an excellent literature review and bibliography, see generally Cooter & Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989). See generally Landes & Posner, *supra* note 25; Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

35. These expectations are determined by the probability of a win or loss at trial.

36. Cooter & Rubinfeld, *supra* note 34, at 1070.

37. Recently, Janet Cooper-Alexander has demonstrated that both economic models and models that attempt to predict outcomes on the basis of strategic use of legal bargaining chips do not explain the settlements in securities class actions. See generally Cooper-Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991). Her findings in the securities cases (that cases settle for a "going rate of 25% of the complaint demand" because of non-legal merits, structural factors such as attorneys' fees, procedural rules, risk aversion of the parties, and insurance payment policies) has implications for other civil case settlements. More frequently than practicing lawyers, legal scholars seem surprised that cases settle for reasons other than the legal merits, or the law and economics version of the legal merits (the "expected value" at trial discounted by transaction costs). One of the implications of Cooper-Alexander's study—and this Article—is that the availability of particular procedures or processes, and the specific activity that occurs therein, clearly affects the outcomes that are produced. Like other commentators, Cooper-Alexander is concerned that aggregations of private settlements may compromise important macro public concerns—such as regulation of securities trading. See generally Condlin, *supra* note 25; Fiss, *supra* note 3; Luban, *supra* note 7.

38. See Priest & Klein, *supra* note 34, at 5-6 for the "50% rule." Where gains and losses from litigation are equal to each party, the decisions made by the parties will tend to create strong bias toward a plaintiff success rate of about 50%. *Id.* See also Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L. REV. 527 (1989).

39. This view has also affected these judges as they make decisions about the appropriateness of particular settlement activities. See, e.g., *Heileman Brewing Co. v. Joseph Oat Co.* 871 F.2d 648 (7th Cir. 1988), *reversing* 848 F.2d 1415 (7th Cir. 1988).

led to very different institutionalized forms of ADR. Confusion about the purposes behind a particular form of innovation has led to important policy decisions and legal rulings which have given expression to different values underlying particular forms of ADR.<sup>40</sup>

Partly because of the institutionalization of ADR, some of its earliest proponents, including anthropologist Laura Nader,<sup>41</sup> now oppose ADR because it does not foster communitarian and self-determination goals. Instead, it is used to restrict access to the courts for some groups, just at the time when these less powerful groups have achieved some legal rights. Indeed, some critics have argued that ADR actually hurts those who are less powerful in our society—like women<sup>42</sup> or racial and ethnic minorities<sup>43</sup>—by leaving them unprotected by formal rules and procedures in situations where informality permits the expression of power and domination that is unmediated by legal restraints.<sup>44</sup> In other criticisms, proceduralists have argued that various forms of ADR compromise our legal system by privatizing law making, shifting judicial roles, compromising important legal and political rights and principles, and failing to grant parties the benefits of hundreds of years of procedural protections afforded by our civil and criminal justice rules.<sup>45</sup>

In the context of ordinary litigation, we assume that when the parties settle they are doing so either because they think they have reached a consensual and wise solution (a “positive” settlement), or because they fear they will do worse at trial (a “negative” or “satisficing” settlement). The parties may not accurately be able to predict what might happen in court. However, there is some notion that what they are contracting out of—the adjudicated result. It is known to them and is the result of a publicly controlled process. If settlements are “coerced” by court order and conducted privately at the same time, we may be less confident in what the parties are agreeing to, and

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40. See generally Menkel-Meadow, *supra* note 13.

41. See generally L. NADER, *LAW IN CULTURE AND SOCIETY* (1969); L. NADER, *NO ACCESS TO LAW* (1980). Contrast with comments in Proceedings of the Annual Chief Justice Earl Warren Conference on Advocacy-Dispute Resolution (1985). See A. LEVIN, E. GREEN, J. ETHERIDGE, C. MENKEL-MEADOW, T. LAMBROS, *DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY* 130-31 (1985) [hereinafter *DISPUTE RESOLUTION DEVICES*].

42. See generally Alschuler, *supra* note 7; Fineman, *supra* note 7; Grillo, *supra* note 7; Lerman, *supra* note 7; Woods, *supra* note 7.

43. See generally Delgado, Dunn, Brown, Lee & Hubbert, *supra* note 7; Edwards, *supra* note 3; Yamamoto, *supra* note 7.

44. For example, the failure to compel information through formal discovery sanctions may place certain persons at a disadvantage.

45. Such proceduralists include Owen Fiss and Judith Resnik. See generally Fiss, *supra* note 3; Resnik, *supra* note 3; Resnik, *supra* note 7.

we may have less opportunity to regulate abuses. This decreased opportunity comes from our inability to observe how settlements are reached. This problem is further compounded if for some reason we do not trust parties to resist certain forms of settlement, especially if they cannot afford to "resist" and go to trial.

Given the widely disparate views of the functions and purposes of ADR, why should we pursue settlement? Without restating my previously elaborated views,<sup>46</sup> solutions which attempt to meet many of the needs and interests of the parties<sup>47</sup> have the potential of realizing an outcome that is fairer, more sensitive to the complex needs of the parties, and more likely to be followed. This is particularly true in a process in which the parties have some control of their dispute, rather than having their past failings decided upon by a third party without regard to any possible future relationship.<sup>48</sup>

This, however, is not true in all cases. For example, when a moral principle must be enunciated,<sup>49</sup> or a legal precedent is necessary,<sup>50</sup> or the parties are not equally empowered with respect to their dispute, additional factors must be considered. But it may be true for many fact-intensive cases which come into our legal system with few legal principles at stake.<sup>51</sup>

Thus, the key to answering the question "why pursue settlement?" is to know what the alternatives are and to determine by what standards both settlement and the alternatives will be measured. This implicates two of the major theoretical and philosophical questions confronting the innovations of ADR: (1) are there principled reasons for preferring one process or result over another?,<sup>52</sup> and (2) by what

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46. Menkel-Meadow, *supra* note 1.

47. This statement describes parties as abstractions. One of the issues about whether ADR is appropriate focuses on the concrete situation of the parties—if there are great power imbalances between the parties, for example, the case may be inappropriate for nonjudicial or non-third party resolution.

48. I do not mean to restrict this comment to ongoing relationship cases. It can refer simply to the future likelihood of achieving compliance with a court order.

49. *Brown v. Board of Education*, 349 U.S. 294 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973) are obvious examples.

50. There is debate, for example, about whether the important "first impression" issues involved in the asbestos litigation were best left to courts or to private settlement arenas.

51. See generally Brazil, *supra* note 7.

52. This problem is also known as the "allocation problem." The ADR literature is replete with attempts to develop a taxonomy or classification system for allocating different disputes to different dispute resolution forms. See generally Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893; Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985). I long ago abandoned such attempts because of the dynamic processes of many legal disputes. I think we will be able to make allocation decisions at the extremes (cases that are totally "fact"

standards of appropriateness for dispute resolution should such decisions be measured?<sup>53</sup>

Can we evaluate settlements produced by ADR mechanisms as a totality, or do their different forms and practices—as developed both in the public and private spheres—raise different issues that must be analyzed on a critical, case-by-case, principled basis? This is the nature of our common law system of adjudication—to deal with issues on a case-by-case basis. In the remainder of this Article, I examine some of the first cases challenging ADR devices used in the courts—the public sphere—in the hope of developing some principled bases for determining when and how we should pursue settlement. As ADR becomes institutionalized within the court system, one can ask whether advocacy is one of many tools of dispute resolution, or whether alternative forms of dispute resolution will be captured by the dominant culture of adversarial advocacy. If the processes of adversarial adjudication and “facilitated” settlement<sup>54</sup> are joined in the same institutions, what are the implications for each process? More importantly, what are the implications for justice?

### III. THE INSTITUTIONALIZATION AND LEGALIZATION OF ADR

ADR has found its way into the legal system in a variety of forms. I am primarily concerned here with those which the courts in the formal legal system have adopted or approved. In the private arena, negotiated settlement, arbitration, mediation, mini-trials,<sup>55</sup> and private judg-

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or totally “law”), but I have seen too many cases that seemed to belong to one category actually flourish in a dispute resolution process that some might think inappropriate (i.e., the private settlement or mediation of a public employment discrimination lawsuit). *See generally* Norton, *supra* note 7.

53. This is known as the “baseline problem.” The problem of against what standard various processes should be measured has been a methodological problem that has confronted evaluation researchers, philosophers, legal theorists, and economists studying the settlement phenomenon. Most commonly, settlement is measured against some homogenized and generalized notion of “adjudication.” *See generally* Fiss, *supra* note 3; Resnik, *supra* note 3. Political scientist Herbert Kritzer has suggested that in fact the amount of “adjudication” in our legal system is greater than many assume because a large number of case terminations or resolutions actually do involve some authoritative ruling by the court, such as a summary judgment decision or other motion decision. *See generally* Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986). More recently, the various forms of ADR have been homogenized and generalized and have been compared to the more typical private dyadic negotiated settlement or “shadow bargain.” *See* Luban, *supra* note 7, at 389. For a discussion of baseline issues as they effect measurement problems, *see generally* Tyler, *supra* note 12.

54. While serving as a technical definition of one form of dispute resolution—mediation—I use the term “facilitated settlement” generically here to refer to all forms of court-assisted or court-encouraged settlement practices, particularly those that use some form of third party involvement.

55. Mini-trials are a hybrid form of negotiation, mediation, and arbitration. *See generally* Green, *The Mini-Trial Handbook*, in *CORPORATE DISPUTE MANAGEMENT* (E. Green ed. 1982).

ing have been developed. A variety of private consulting firms and professional entities promote ADR and provide professional expertise in developing ADR mechanisms to suit particular disputes.<sup>56</sup> More problematic has been the privatization<sup>57</sup> of public dispute resolvers.<sup>58</sup>

In the public sector, courts have used the primary forms of dispute resolution by encouraging negotiation and settlement, by increasing the use of mandatory settlement conferences,<sup>59</sup> and by instituting both mandatory and more consensual forms of arbitration and mediation.<sup>60</sup> In addition, federal district judge Thomas Lambros created a new

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56. The organizations ENDISPUTE, JUDICATE, and American Mediation Service are examples of such private consulting firms. In addition, a new breed of private practitioner now specializes in ADR, either within a conventional law firm or in a practice specially devoted to dispute resolution services. Former Steptoe & Johnson partner Marguerite Millhauser's Conflict Consulting, Inc., Washington, D.C. is just one example.

Perhaps the largest effort at private dispute resolution was the formation of the Asbestos Claims Facility. This was an entity created with the assistance of Dean Emeritus Harry Wellington, on behalf of manufacturers of asbestos and their insurers, to facilitate prompt payment to asbestos plaintiffs with ADR mechanisms available to resolve disputes between and among producers and insurers. See generally Wellington, *Asbestos: The Private Management of A Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85); Asbestos Claims Facility Goes Public, 2 ALTERNATIVES 1 (1984). The Asbestos Claim Facility disbanded in 1988 when several of its leading members resigned over disputes about the proper allocation of formulas for contributions and payments. Some of the producers and insurers also thought that they could decrease the amount of money they were paying out by litigating. Some of the remaining members have formed a new successor entity.

57. The issue of privatization of dispute resolution services is a big one with analogues in a wide variety of social services and institutions, such as health, education, see generally J. CHUBB & T. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* (1990), prisons, and resource management. The question of what services should be provided by public governmental entities and what should be allocated to the private market sphere is beyond the scope of this paper, but the issues implicated in the privatization of dispute resolution may have rippling effects in other public service areas, not to mention implications for the significant legal issues encountered in the public/private constitutional dichotomy. See generally *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

58. One example of this method is California's "Rent-a-Judge" procedure, authorized by CAL. CIVIL PROC. CODE §§ 638-645 (West 1990). For discussions of this method, see generally Chernick, *The Rent-a-Judge Option: A Primer for Commercial Litigators*, 12 L.A. LAW. 18 (Oct. 1989); Gnaizda, *Secret Justice for the Privileged Few*, 66 JUDICATURE 6 (1982); Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). A recent study of the California Judicial Council coolly endorsing private judging has met with a great deal of controversy. Carrizosa, *Judicial Council Wants New Study of Private Judges*, L.A. Daily Journal, Nov. 19, 1990, at 1.

59. FED. R. CIV. P. 16. See generally Menkel-Meadow, *supra* note 6.

60. See generally P. EBENER & D. BETANCOURT, *COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE* (RAND Inst. for Civ. Just. No. N-2257-ICJ, 1985) (documenting the results of a national survey which determined how many state and federal jurisdictions had authorized arbitration for civil cases); K. SHUART, *supra* note 33 (examining a mediation procedure in use under a local rule of the Eastern District of Michigan with reference to operation and performance. This procedure relied on the Mediation Tribunal Association, an independent, nonprofit organization, to supply a pool of mediators who would be assigned complete responsibilities for resolution of certain cases).

form of ADR for the courts in the early 1980s—the summary jury trial.<sup>61</sup> This “trial” involves a shortened form of case presentation, usually without witnesses, to a “shadow” jury chosen from the jury venire<sup>62</sup> who provide a “verdict” which is used to facilitate more “reasonable” party negotiations. Courts vary a great deal in the requirements for these procedures. Requirements range from mandatory participation and binding orders to nonbinding orders or consensual processes with or without penalties for failure to participate or failure to accept a settlement offer.<sup>63</sup>

Most recently, the Judicial Improvements Act of 1990<sup>64</sup> now requires each federal district court to develop a civil justice expense and delay plan. Each court must use an advisory committee consisting of “attorneys and other persons who are representative of major categories of litigants in such court.”<sup>65</sup> The court, in consultation with its advisory group, must consider “authorization to refer appropriate cases to alternative dispute resolution programs . . . including mediation, minitrial, and summary jury trial.”<sup>66</sup> In addition, this new statute urges consideration of such other litigation cost and delay management devices as requiring parties with authority to settle to be available for settlement conferences.<sup>67</sup> Thus, Congress has begun to urge (if only at the “optional” district court level for the present) institutionalization of many ADR devices within the courts, including some of those challenged by the litigation discussed herein. The Act provides for the development of model plans for case management,

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61. See generally Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution—A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

62. See Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990) (holding that jurors could not be ordered to participate in summary jury trials).

63. See FED. R. CIV. P. 68 for an example of a settlement offer process; see also Marek v. Chesney, 473 U.S. 1 (1985) (when settlement offer is made under FED. R. CIV. P. 68 and rejected, and judgment finally obtained is not greater than original offer, offeror is not liable for offeree's attorney's fees incurred after the offer of settlement).

64. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 1991 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 5089 (to be codified at 28 U.S.C. §§ 471-82). Interestingly, provisions of this bill were originally introduced as mandatory requirements for the courts to begin to employ particular case management and settlement devices, but in the final form these provisions were permissive only except for the specified pilot and demonstration districts. See 136 CONG. REC. S17575 (daily ed. Oct. 27, 1990) (statement of Sen. Biden). See also *Congress Approves Civil Justice Reform Law; ADR, Case Management to Play Large Roles*, 8 ALTERNATIVES 195 (Dec. 1990).

65. Civil Justice Reform Act of 1990, (104 Stat.) 5094 (to be codified at 28 U.S.C. § 478(b)).

66. *Id.* at 5092 (to be codified at 28 U.S.C. § 473(a)(6)(B)).

67. *Id.* at 5092-93 (to be codified at 28 U.S.C. § 473(b)(5)). See discussion of Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1988) *infra* notes 96-109 and accompanying text.



sets up several demonstration districts, and authorizes training and a final report (to be completed in four years) on implementing such litigation cost and delay reduction plans.<sup>68</sup>

The language of the new statute is notable for its adoption of efficiency goals and purposes as the stated objectives. More significantly, the Act may represent a new chapter in debates about allocation of decision-making authority about court processes between Congress and the courts themselves. Thus, arguments about institutionalization of various ADR and litigation management devices will continue while embedded in larger issues of separation of powers and procedural justice.

In addition to private and public forums for dispute resolution, ADR has been institutionalized in the professional organizations and associations it has spawned: the Society of Professionals in Dispute Resolution (SPIDR), CPR, the National Institute of Dispute Resolution (NIDR), the ADR Section of the American Association of Law Schools (AALS), and an American Bar Association (ABA) Special Committee on Dispute Resolution. It has also produced several publications: a BNA Reporter,<sup>69</sup> CPR's Newsletter,<sup>70</sup> NIDR's Newsletter,<sup>71</sup> and several specialized law reviews.<sup>72</sup> In addition, 164 law schools now offer courses in ADR, with 574 professors teaching the subject.<sup>73</sup>

What has this "institutionalization" meant? Has the growth and expansion of alternative dispute resolution institutions changed the consciousness of those whose job it is to solve legal problems?

In my view, the qualified answer to these questions is no. This is illustrated by the cases which are now beginning to deal with some of the difficult legal issues raised by the uses of ADR. As we survey some of these developments, I suggest that attempts to innovate have been partly, if not totally, "captured" and co-opted by the uses to which advocates have put these new procedures. At the same time, advocates "attacking" or "manipulating" ADR may tell us something about its limits and abuses in the court system and alert us to the regulatory boundaries that may be necessary to keep each process working within its proper sphere.

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68. *Id.* at 5089-94.

69. BNA's Alternative Dispute Resolution Report was first published on April 30, 1987.

70. CPR's newsletter, *Alternatives to the High Cost of Litigation*, was first published in January, 1983.

71. Dispute Resolution Forum has been published since 1985.

72. These include the *MISSOURI JOURNAL OF DISPUTE RESOLUTION* and the *OHIO STATE JOURNAL OF DISPUTE RESOLUTION*. See also 66 *DEN. U.L. REV.* (1989); 37 *J. LEGAL EDUC.* (1987); 14 *PEPPERDINE L. REV.* (1987); 16 *PEPPERDINE L. REV.* (1989); 37 *U. FLA. L. REV.* (1985); 21 *WILLAMETTE L. REV.* (1985).

73. West Publishing, 42 *LAW SCH. NEWS* 2 (Feb. 1990).

I was first struck by the omnipresence of the adversary model when, as a mediator for the Asbestos Claim Facility, I received a copy of a letter in which one party had "filed an ADR proceeding *against*"<sup>74</sup> the other party. The fact that the process had been labeled a mediation process did nothing to move the parties away from their adversarial perceptions of each other. The ADR proceeding of "mediation" was just a condition precedent to be attended to on the way to litigation. As the parties engaged in more disputing about the rules of the proceedings,<sup>75</sup> it became clear that ADR was just another stop in the "litigation" game which provides an opportunity for the manipulation of rules, time, information, and ultimately, money.

As ADR has been increasingly used by courts and by private institutions of dispute resolution, it has been increasingly "legalized"—made the subject of legal regulation, in both private and public rules systems. Skillful lawyers are raising legitimate claims regarding the constitutionality of some of the aspects of ADR—such as infringements of the right to a jury trial, separation of powers, due process, and equal protection.<sup>76</sup> Other claims which may not be as legitimate—such as refusing to participate in arbitration by claiming that it is coerced discovery—demonstrate that ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem-solving.

In reviewing the following recent cases, I have identified some of the recurring policy issues that emerge in this "legalization of ADR."

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74. The analysis of the use of language and metaphor by lawyers engaged in dispute resolution practices could itself be the subject of study. Even as the "forms" are changed to technically less adversarial models, the language of adversarial litigation remains quite powerful. For example, many mediation programs label one party the complainant and the other the respondent, rather than "the parties." The programs also use ground rules remarkably close to trial rules—opening statements, cross-examinations, closing "arguments," and rebuttals. See, e.g., L. BURTON, TRAINING MANUAL FOR MEDIATORS (Neighborhood Justice Center 1986). See generally the work of William O'Barr and his colleagues on the discourse of litigation practices. J. CONLEY & W. O'BARR, RULES VS. RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 78 DUKE L.J. 1375 (1978). See also Cobb & Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, paper presented to 1990 Law & Society Meeting, San Francisco.

75. Disputing about the rules is particularly strong evidence of the persistence of an adversary culture, particularly since the Asbestos Claims Facility has a detailed specification of rules and procedures to be followed. CPR has prepared detailed procedural practice manuals for mediation, arbitration, mini-trials, technology disputes, employment disputes, international commercial disputes, environmental disputes, and a variety of other specialized areas (e.g., high technology disputes). See generally CPR LEGAL PROGRAM, PRACTICE GUIDE SERIES (1988-90) (currently 22 volumes).

76. Golann, *Making ADR Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 493 (1989).

### A. Contradictions in "Mandatory" ADR

Much of what motivates the "quality" proponents of ADR is the notion that the parties have to want to resolve their disputes in a different way. However they come to understand the process, the key to arriving at "quality" solutions is through motivating the parties to recognize that the courts will not give them what they want by win-lose judgments of damages or through the use of injunctive relief.<sup>77</sup> Thus, in its purest form, the key to effective dispute resolution is found in voluntary participation by the parties and commitment to the process of mediation.<sup>78</sup>

Many of the current programs that require parties to submit to arbitration or mediation programs (either in all cases or in those under a specified value) make participation mandatory.<sup>79</sup> Some of the objections to these mandatory processes have made their way through the courts. In *Strandell v. Jackson County*,<sup>80</sup> the Seventh Circuit held that litigants could not be forced to use the summary jury trial device.<sup>81</sup> The facts are instructive because they demonstrate the clash of "quality" versus "quantity" arguments. The plaintiffs were parents of a man who committed suicide after he was subjected to a strip search and arrest.<sup>82</sup> Through discovery, plaintiffs' attorney obtained the

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77. Of course, not all judgments are binary or rigid formulations of damages and injunctions. There are "compromise verdicts," comparative negligence considerations, and all kinds of equitable relief. There is also the more complex kind of ruling in a wide variety of law reform, institutional, and public law cases. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

78. See generally J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); C. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986); N. ROGERS & C. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (1989); N. ROGERS & R. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* (1987).

79. The law "forces" people to bargain, negotiate, or settle. Judges argue over whether FED. R. CIV. P. 16 authorizes mandatory settlement conferences, see *infra* notes 80-104, and accompanying text. Labor law requires labor and management to bargain "in good faith." 29 U.S.C. §§ 158(a)5, 158(b)3, 158(d) (1988).

80. 838 F.2d 884 (7th Cir. 1988). This case was brought as a civil rights action.

81. *Id.* at 888. The case has been the subject of much commentary. See generally Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. DISPUTE RESOLUTION 213 (1989); Maatman, *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455 (1988); Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87 (1990); Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483 (1988); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990).

82. 838 F.2d at 884.

names and statements of twenty-one witnesses.<sup>83</sup> Defendants later tried unsuccessfully to obtain these names and statements but could not because they were protected under the work-product doctrine.<sup>84</sup> Initially, the district judge asked the parties to voluntarily submit to a summary jury trial.<sup>85</sup> Plaintiffs' counsel refused, partly because he did not want to reveal the names and statements of the witnesses before trial.<sup>86</sup> In short, plaintiffs' counsel saw the summary jury trial as an opportunity for "free discovery" on the part of a less than diligent defense counsel. The district judge tried to persuade the parties to participate because his full docket would have made him unable to get to the case "in the foreseeable months ahead."<sup>87</sup> Plaintiffs' counsel then refused to participate in the summary jury trial ordered by the district judge, and counsel was held in criminal contempt.<sup>88</sup> The judge rested his authority to order the summary jury trial on Federal Rule of Civil Procedure 16, which authorizes judges to facilitate settlement of the case.<sup>89</sup> The district judge stated that "the ability of a court to use its best judgment to move its crowded docket must be preserved, where it involves a nonbinding yet highly successful procedure."<sup>90</sup> The Seventh Circuit rejected this view, noting that it was not commenting on the effectiveness of the proceeding where parties volunteered to participate.<sup>91</sup> It held that Rule 16 did not extend to requiring settlement and stated that "Rule 16 . . . was not designed as a means of clubbing the parties—or one of them—into an involuntary compromise."<sup>92</sup> The court was troubled by the effect a summary jury trial would have on the discovery process and the work-product doctrine,<sup>93</sup> and it sup-

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83. *Id.* at 885.

84. *Id.* at 884.

85. *Id.* at 885.

86. In terms of the practical realities of the case, some of the witnesses were either present or former employees at the jail, and there was fear that they would be intimidated into changing their stories before trial after the public "exposure" of a summary jury trial.

87. 838 F.2d at 885. The record indicates that the case was fully ready for trial and the judge's inability to put it on the trial docket served as a "threat" to force settlement. There is also some suggestion that the defendants, and possibly the judge, specifically wanted to prevent public exposure of this case. Civil rights cases like *Strandell* are likely to raise these issues of opposite preferences on the part of each party for public exposure versus privacy.

88. *Id.* at 885.

89. *Id.* at 886; see also FED. R. CIV. P. 16(a)(5), 16(c).

90. 838 F.2d at 886.

91. *Id.* at 886 n.2. The court noted the conflicting commentary on the effectiveness of summary jury trials. *Id.* (citing Lambros, *supra* note 61; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386 (1986)).

92. *Id.* at 887 (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)).

93. In *Strandell*, the court seems to accept an archaic notion of surprise at trial that the summary jury trial would interfere with. 838 F.2d at 888. Similarly, concerns about privilege and

ported the rights of litigants to proceed to trial with confidential and protected information.<sup>94</sup>

The Seventh Circuit's decision in *Strandell* is interesting because it does not comment on the need for voluntariness for the negotiation process to be successful, but instead further inscribes the rights of parties to adversary trials at which new information and surprise is entirely appropriate and may be necessary to challenge power imbalances. Thus, it is the value of the adversary proceeding, and the parties' right to choose that process in this particular context, rather than the ineffectiveness of the ADR proceeding that is the court's concern. Several other district courts have refused to follow the rationale of *Strandell* and have authorized mandatory participation in summary jury trials.<sup>95</sup>

In contrast to *Strandell*, the same court held that a judge or magistrate could require a party, and not just the lawyer, to attend a mandatory settlement conference.<sup>96</sup> The *Heileman* majority based its decision on a more expansive reading of Federal Rule of Civil Procedure 16 and the "inherent power" of courts to develop procedural

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work-product doctrine should be no different here than in the general discovery process. In *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988), the district court criticized *Strandell* and stated:

[B]ecause of the extensive pre-trial procedures involved in preparing litigation in federal courts and because [summary jury trial] is based on facts disclosed by discovery and is to be a synopsis of the actual trial, it is difficult to believe that anything would be disclosed at a [summary jury trial] that would not ultimately be disclosed at the actual trial. If the Seventh Circuit implication is that a [summary jury trial] prevents the litigant from saving some surprise for the trial, the Federal Rules of Civil Procedure are designed to avoid that eventuality. Trial by ambush is no longer an accepted method of practice.

*Id.* at 606.

94. *Strandell*, 838 F.2d at 888. The Sixth Circuit has also disapproved of some aspects of mandatory settlement. See *Tiedel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988) (court refused to sustain the shifting of attorneys' fees where the plaintiff refused to accept a mediated settlement from the Michigan mandatory mediation program and went on to lose at trial).

95. See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988) (summary jury trial ordered over the objection of plaintiffs); *Arabian American Oil, Co. vs. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (summary jury trial ordered over the plaintiff's objection that it was a waste of time and money because settlement was an impossibility); *Home Owners Funding Corp. v. Century Bank*, 695 F.Supp. 1343 (D. Mass. 1988) (noting that a court has the power to order a summary jury trial under Rule 16 of the Federal Rules of Civil Procedure); *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988) (summary jury trial ordered by magistrate over objections by all parties to proceeding because the parties all claimed they were too far apart to come to any reasonable settlement and because the cost—over \$50,000—of the summary jury trial itself would be excessive).

96. *Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1988) (en banc) (involving four million dollars and a possible lengthy trial over factually complex contracts claims having to do with installation of a water treatment facility). The decision was a slim 6-5 majority with several concurring and dissenting opinions.

authority beyond, or in interpretation of, the Federal Rules.<sup>97</sup> Writing for the majority, Circuit Judge Michael Kanne noted that pretrial settlement conferences were an effective way to alleviate court delays.<sup>98</sup> In a sense, the view that mandatory procedures of settlement help reduce delay is in the nature of a "cultural" fact—believed by those who want to believe it even if belied by the empirical reality. Judge Kanne thought the function of a broader reading of Rule 16 was to "urge judges to make wider use of their powers and to manage actively their dockets from an early stage."<sup>99</sup> That power was held to require represented parties to appear at settlement conferences.<sup>100</sup> In this case, therefore, it was not an abuse of discretion to require a busy executive to travel from Camden, New Jersey to Madison, Wisconsin for a settlement conference.<sup>101</sup> When the corporate defendant failed to send an authorized representative to the settlement conference, the defendant (Joseph Oat Corporation) was fined \$5,860.01.<sup>102</sup> Ironically, the case eventually settled with a summary jury trial, and a payment by the defendant to the plaintiff for the allegedly defective wastewater pretreatment system.<sup>103</sup> In his opinion, Judge Kanne expressed the view that the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure (specifically subsections (b)(7) and (c)) contemplated a distinction between being required to attend settlement conferences and being compelled to reach a settlement.<sup>104</sup>

The views of the dissenting judges express many of the concerns about mandatory settlement processes. Though most of the dissenters did so on the basis of their different readings of Federal Rule 16 and

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97. *Id.* at 651.

98. *Id.* Note here the persistence of the view that such mandatory settlement techniques do affect court caseloads, despite the empirical evidence to the contrary. The empirical evidence on the effectiveness of mandatory settlement conferences in reducing court dockets does not support a claim that settlement conferences should be used for efficiency purposes. See generally M. ROSENBERG, *supra* note 33; Menkel-Meadow, *supra* note 6; Posner, *supra* note 91. As a judge and scholar, Judge Posner raises the efficiency issue by suggesting that if judges spend their time at mandatory settlement conferences, they may actually reduce court efficiency by being less available to try cases. Posner, *supra* note 91, at 382.

99. Heileman, 871 F.2d at 652.

100. *Id.* at 654-55. The court also recognized that such powers could be abused. *Id.* at 653 (citing *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) (reversing a district court judge who tried to coerce the parties into settlement by threatening sanctions against any party who did not comply with his settlement recommendation)).

101. Heileman, 871 F.2d at 654.

102. *Id.* at 650. This amount covered the costs of attendance at the conference by other parties and counsel. *Id.*

103. *Courts Can Compel Clients to Attend Settlement Talks*, 7 ALTERNATIVES 77 (1989).

104. Heileman, 871 F.2d at 653. This distinction is not dissimilar from the requirements in labor law to bargain "in good faith" without being compelled to reach agreement or to reach a substantively "fair" agreement. See, e.g., *NLRB v. Wooster Div.*, 356 U.S. 342 (1958).

the "inherent powers" doctrine, Judge Easterbrook expressed concern that judicial orders to attend settlement conferences would eventually prove to be economically inefficient for managers paid to manage and not to engage in litigation.<sup>105</sup> As expressed by Judge Posner, "[t]he broader concern . . . is that in their zeal to settle cases judges may ignore the value of other people's time. One reason people hire lawyers is to economize on their own investment of time in resolving disputes."<sup>106</sup> Judges Posner and Easterbrook, both proponents of law and economics efficiency measures of the judicial system,<sup>107</sup> thus find demonstration of cost savings to the judicial system weak. As a result, they are concerned about efficiency losses to the litigants in having to attend settlement conferences.<sup>108</sup> Thus, efficiency measures may be different for individual parties—those required to attend the conferences—than for the judicial system as a whole. Even if party-attended mandatory settlement conferences produced more or better settlements in the aggregate, and there is no clear evidence that they do, the costs to the litigants in any particular case may be great. Even this simple measure of efficiency must be calculated with respect to different institutional players and spheres. The judicial system's efficiency may turn out to be inefficient for the market and other spheres of the state.

There may be an ironic truth in this position. Many of the alternative settlement practices were designed to decrease the time that corporate executives and other busy litigants were to spend in litigation. One of the major motivating impulses of the private mini-trial is that busy executives were to spend a short amount of time focusing on a major case, rather than spending more time at depositions and trial. But, the success of the mini-trial is in part due to its difference from the traditional full trial. Were every case processed through a mini-trial, executives and other litigants would indeed be spending a great deal of time on cases, perhaps at an earlier stage, perhaps with some success at settlement, but also perhaps in duplicative time if the cases did not settle and were eventually tried. Thus, Judges Easterbrook

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105. *Heileman*, 871 F.2d at 663 (Easterbrook, J., dissenting).

106. *Id.* at 657 (Posner, J., dissenting).

107. *See generally* Landes & Posner, *supra* note 25.

108. Judge Posner has expressed the view in his scholarly writing, as well as in his opinions, that caseload problems should be solved through the use of other than mandatory settlement devices. *See generally* R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). Some of these methods include increased fees for filing and restrictions on federal jurisdiction (both on substantive and diversity grounds). *Id.* These measures would raise entrance barriers as a preferred method of reducing federal courts overload. *Id.* This approach based on restrictions to access to courts, however, has been soundly criticized. *See, e.g.,* Garth, *supra* note 3; Varat, *Economic Ideology and The Federal Judicial Task*, 74 CALIF. L. REV. 649 (1986).

and Posner may be prescient in seeing the mandatory settlement conference being used increasingly to attempt to produce settlement with the ultimate effect of causing more time to be expended in litigation, rather than less. Thus, the ironies of the "quantitative-efficiency" justifications of settlement may in fact come to encumber whatever efficiency gains are claimed for such processes if they become mandatory and routinized. If party attendance at settlement proceedings becomes the norm rather than the "exception," litigation costs in money and time may in fact increase. As George Priest has argued, litigants may be sensitive to procedural reforms by making their own decisions to litigate or settle as a result of both increases and decreases in delay.<sup>109</sup> This produces an "equilibrium" in court congestion which may not be "cured" by mandatory ADR reforms.<sup>110</sup>

In a variation on the mandatory theme, at least one federal judge has refused to permit a voluntary and joint motion for a summary jury trial on the ground that jurors could not be required to serve in a proceeding not authorized by the Jury Selection and Service Act.<sup>111</sup> He concluded that a summary jury trial was not service on either a petit or grand jury.<sup>112</sup> Further, he stated that summary jury trials as settlement devices, rather than as trials, were not appropriate uses of jurors serving under federal law.<sup>113</sup> Adopting the view expressed in *Cincinnati Gas & Electric Co. v. General Electric Co.*<sup>114</sup> that summary jury trials are private settlement proceedings rather than public trials, the judge found no legal authorization for the use of jurors.<sup>115</sup> Quoting Judge Posner, the district court judge said "nothing in the Jury Selection and Service Act . . . empower[s] federal judges to summon jurors to serve as mediators."<sup>116</sup> The judge also rejected the analogy to advisory juries authorized under the Rules Enabling Act and under Rule 39 of the Federal Rules of Civil Procedure by explaining that advisory juries were intended to advise judges in deciding cases, not to assist parties in settling cases.<sup>117</sup> The decision in *Hume* demonstrates general hostility to the summary jury trial device itself, both on grounds of lack of legal authorization<sup>118</sup> and as a matter of policy:

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109. See generally Priest, *supra* note 38.

110. See generally *id.*

111. 28 U.S.C. § 1861 (1982).

112. *Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990).

113. *Id.*

114. 854 F.2d 900 (6th Cir. 1988).

115. *Hume*, 129 F.R.D. at 509.

116. *Id.* at 509 n.7 (quoting Posner, *supra* note 91, at 385-86).

117. *Id.* at 508 n.5. (citing M. JACOBVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (Federal Judicial Center No. FJC-R-82-1, 1982)).

118. The district court judge in *Hume* rejected all readings of Federal Rules 1, 16, and 39



In my own view, Summary Jury Trial is an unenlightened step backwards. It is reminiscent of a prior legal era, dominated by procedural mechanisms which stifled the candid exposition of the merits. For instance, the non-binding nature of Summary Jury Trials presents great temptation to strategically withhold evidence and argument. Furthermore, when forced, a party might view it as an unacceptable burden or bludgeon.<sup>119</sup>

However, the key concern expressed is that of using jurors on "con-scription" to government service for services which are not authorized.

Thus, as these cases illustrate, the courts are at best ambivalent about whether it is helpful to mandate settlement and if so in what forms. While some courts have made it clear that "coerced settlement" will not be legitimated, the press for resolution of cases and docket reduction will permit, in some courts, a broad reading of the Federal Rules to encourage settlement practices like meeting and conferring with a judge or magistrate and the summary jury trial. One issue to watch in the future is whether settlements negotiated within such environments will be secure, or whether post hoc attacks and appeals on their "coerciveness" will increase in a civil analogue to efforts to undo a guilty plea in the criminal context.

The issue of the compulsion or "mandatoriness" of settlement devices in the courts is more complex than most of the cases or commentary acknowledge. In efforts to find bright lines to distinguish settlement functions from trial and advocacy functions, most courts and commentators have paid insufficient attention to the overlapping nature of these enterprises. Summary jury trials are settlement devices that closely resemble trials with adversary presentations and strong advocacy on the part of lawyers. They are designed to present a "shadow verdict" of what a "real" juror would do at trial to guide the parties to a more realistic assessment of their expected outcomes. Thus, some of the full protections of court proceedings, such as evidentiary rulings, may be necessary to assure accuracy of outcome. Similarly, as judges and magistrates order counsel and parties to meet and confer, it may be important to develop some rules and guidelines to assure some modest degree of uniformity and fairness.

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and the "inherent power to manage courts and dockets" doctrine, as well as other theories on which the summary jury trial has been based. *Id.* at 510. See generally M. JACOUBOVITCH & C. MOORE, *supra* note 117; Lambros, *supra* note 61.

119. 129 F.R.D. at 508 n.3.

Thus, while many commentators argue that settlement processes should proceed only consensually in the courts,<sup>120</sup> I believe that until we know more about the effectiveness of settlement-seeking devices, the line should not be drawn between mandatory and consensual processes.<sup>121</sup> Rather, the line should be drawn between abusive uses of mandatory processes<sup>122</sup> and those used within the bounds of fairness and our existing rules. If the summary jury trial is a hybrid of a trial, a settlement discussion, and a discovery device, then its conduct can be governed by the rules which apply to such forms. If we are to seek "quality" resolutions of our legal problems, it is not clear that cases will select themselves into the proper categories. Some good mandatory practices offer the possibility of subjecting all cases to similar treatment,<sup>123</sup> both for purposes of evaluation, and to allow some adversarial testing (through legal claims and arguments) of the quality and justice of these procedural innovations. As long as traditional advocacy does not entirely swamp efforts to use innovative settlement devices, such testing should help establish guidelines for good settlement practice.

### B. Public Access to Settlements

From another quarter, where the claims are usually brought by non-parties to the litigation, one of the major critiques of the development of ADR techniques has been that ADR privatizes disputing. To the extent that mandatory settlement conferences, mediation, and summary jury trials result in settlements before a full public trial, they may rob the public of important information.<sup>124</sup> Some critics charge that with so much private settlement there will not be enough public debate, or enough cases going through the traditional adversary system, to produce good law.

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120. After all, parties proceed only consensually in the private sector when they explore alternative ways of resolving their disputes.

121. In such a system, the cases closest to settlement would be most likely to use the public resources of settlement devices in the court sphere and thus might present system inefficiencies.

122. The more common standard for analyzing settlement practices in the courts is "abuse of discretion." See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 655 (7th Cir. 1989). In some uses of the summary jury trial, jurors are not told that they have served in a different capacity than on a petit jury. Many judges, including Judge Posner, find this practice dishonest as well as violative of law. See Posner, *supra* note 91, at 386-87, 389.

123. This would enhance empirical assessments of their effectiveness as well.

124. See generally Fiss, *supra* note 3. See also the remarks of Judith Resnik and Laura Nader at the Annual Chief Justice Earl Warren Conference. *DISPUTE RESOLUTION DEVICES*, *supra* note 41, at 129, 131.

These issues were raised in the case of *Cincinnati Gas & Electric Co. v. General Electric Co.*<sup>125</sup> The Cincinnati Post sought to reverse an order requiring confidentiality and closed proceedings in the summary jury trial conducted by the district court.<sup>126</sup> The district court, in barring the newspaper from attending the hearing, stated that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique."<sup>127</sup> The court went on to hold that there was no first amendment right of access to a settlement proceeding because settlement proceedings were historically private and not subject to public scrutiny.<sup>128</sup> The Cincinnati Post argued that the nature of the case was such that important public interests were involved, and it would be decided more fruitfully if the public could know about the proceedings.<sup>129</sup> In rejecting this second claim, the Sixth Circuit protected the parties' desire for confidentiality over whatever public interest there might be, under a rationale that was based on the importance of the governmental interest in promoting settlements:<sup>130</sup> "Therefore, allowing access would undermine the substantial governmental interest in promoting settlements and would not play a 'significant positive role in the functioning of the particular process in question.'"<sup>131</sup> The court noted that the public would have no right to participate in private negotiations between and among the parties.<sup>132</sup> Because the summary jury trial was not binding and involved no adjudication, it was like a private negotiation and could not be observed.<sup>133</sup>

Some critics have observed that all the values that attach to open criminal trials would apply here as well—"community catharsis,"<sup>134</sup> effect on the outcome, and public education about social and legal norms. But the courts have seen that confidentiality and privacy are precisely the interests that motivate some parties to use particular ADR techniques. For example, in *Cincinnati Gas*, the settlement was only possible because the protective order (agreed upon by the parties) made much of the discovery and information revealed in the summary jury trial confidential.<sup>135</sup>

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125. 854 F.2d. 900 (6th Cir. 1988) (involving questions about the design and construction of a nuclear power plant).

126. *Id.* at 902.

127. *Id.*

128. *Id.* at 903-04.

129. *Id.* at 902.

130. *Id.* at 904.

131. *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

132. *Id.* at 905.

133. *Id.*

134. See generally Comment, *Summary Jury Trials: Should the Public Have Access?*, 16 FLA. ST. U.L. REV. 1069 (1989).

135. 854 F.2d at 901.

Thus, one of the primary values of ADR—confidentiality—is clearly implicated when ADR techniques are used in public spaces. Does the fact that the summary jury trial uses public facilities—the courtroom, the jury venire, judicial and clerk time—change the nature of the proceeding? As some commentators have noted, it is too facile to compare the summary jury trial to either a full trial or a private negotiation process: it is a hybrid and has elements of both. Thus, Laura Nader's concern that we would never have learned about the defects of the Pinto if the first case had been resolved in a private summary jury trial<sup>136</sup> requires us to consider which cases should settle and how. Our legal system encourages private settlements. With a party-initiative adversary system, the parties can choose to take the case out of the system at any time.<sup>137</sup> When settlement structures become "mandatory" and take place in our public judicial system, however, the issues become more complex.

The cases may be distinguished when the parties desire both privacy and confidentiality but some third party seeks "publication," as in *Cincinnati Gas*. If the parties agree, the question is whether public facilities should be used to facilitate private settlements, especially if there is a demonstrated interest on the part of at least some of the public to know what is transpiring. If the parties want to keep their dispute private, and assuming they can both afford the costs, they can choose one of the private dispute resolution mechanisms. Preferences about privacy and confidentiality may change over the course of the dispute, however, and some disputants may need the force of the public dispute system to get the attention of the other side.<sup>138</sup> Our system currently grants privacy within full court adjudication in a number of

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136. See DISPUTE RESOLUTION DEVICES, *supra* note 41, at 129-131 (comments of Nader and Claybrook). See also debates about new legislation prohibiting the sealing of court records of both discovery and settlement documents, N.Y. Times, March 3, 1991, at E6, col. 1 (describing new statutes in Florida, Texas, New Jersey, and New York that seek to prohibit secret settlements in certain types of cases).

137. Some have argued that cases, especially class actions with implications for more than the named plaintiffs, can be settled too easily and should be subject to more searching inquiry by judges. See generally Cooper-Alexander, *supra* note 37; Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43; Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L.REV. 308 (1985). We could also ask whether there are types of cases or particular clients who should not be able to settle—for example, clients involved in termination of parental rights hearings, or those with so little economic, mental, or political power that we can never be sure they have fully consented to settlement. See, e.g., *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) (rejecting contention of indigent parent convicted of second-degree murder who argued that due process clause required counsel to be provided for her in procedure to terminate her parental rights on grounds of willful neglect).

138. See generally Felstiner, Sarat & Abel, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

types of legal disputes, such as child abuse, some juvenile criminal proceedings, and some family law matters.

A different problem develops when one party desires publicity and the other seeks to keep the proceedings confidential.<sup>139</sup> In this area, the mandatory requirements of ADR interact with the desires for privacy or confidentiality. If parties can be ordered to participate in summary jury trials, court-compelled arbitrations,<sup>140</sup> or early neutral evaluations,<sup>141</sup> they can be foreclosed from a public disposition of their case.<sup>142</sup> The facile answer usually given to this criticism is that no party is required to settle in such proceedings, and the party can always insist on a right to jury trial. Others believe that the best way to deal with this problem is to acknowledge the use of public facilities and to open these mandatory processes to the public, even at the expense of some parties choosing not to elect such proceedings.<sup>143</sup>

Others have suggested that if processes are private, at least the final outcomes or settlements should be made public in order to analyze the problems of aggregate or repetitive claims in our society.<sup>144</sup> Others, including myself, have suggested that if we are to evaluate the quality of the processes being used to facilitate settlements, we must also have some public scrutiny of the processes being employed, especially when they are employed in the courts. This in turn, leads to problematic distinctions to be drawn within the courts. If summary jury trials use public courtrooms and public funds, should mandatory settlement conferences held in chambers of judges or magistrates be "open" or at least recorded for some public scrutiny? To suggest that all settlement functions should be conducted in public is likely to greatly diminish the use of techniques and devices that often promote settlement.<sup>145</sup>

The one certainty in this difficult area is that we cannot make decisions about the appropriateness of public access to proceedings simply on the basis of the simplistic categories used by the court in *Cincinnati*

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139. This was the problem in *Strandell v. Jackson County*, 838 F.R.D. 333 (S.D. Ill. 1987).

140. Congress recently authorized more federal district courts to mandate arbitration. 28 U.S.C. §§ 651-58 (1988).

141. See generally Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

142. This is particularly true since some of these proceedings do not occur in public courtrooms, but in private law offices.

143. See generally Rickey, *Rule 16: A Survey and Some Considerations For the Bench and Bar*, 126 F.R.D. 599 (1989).

144. See DISPUTE RESOLUTION DEVICES, *supra* note 41, at 125-34. Some states are beginning to mandate such outcome disclosure, as well as permit public access to litigation documents. N.Y. Times, *supra* note 136.

145. An example is the caucusing frequently conducted by federal judges and magistrates in

*Gas*.<sup>146</sup> Summary jury trials are engaged in to promote settlement, but they also use the forms and facilities of public trials. Similarly, public and private distinctions will not always be easy to make as disputes that appear to be private actually involve important public interests.<sup>147</sup> More on-going analysis of the underlying public policies, perhaps on a case-by-case basis, will be necessary before we can reach tidy solutions to this important issue.

A recent case decided in Florida, *News-Press Publishing Co. v. Lee County*,<sup>148</sup> further illuminates the potential complexities of simplistic categorization. In a state court proceeding involving several local government entities over the siting of a proposed bridge, the trial judge ordered the parties to mediate.<sup>149</sup> The judge further required the parties to bring a representative with full authority to settle the dispute to the mediation.<sup>150</sup> A local newspaper filed a motion to open the closed mediation on the grounds that Florida's Sunshine Law<sup>151</sup> required that meetings of local governmental entities be open to the public.<sup>152</sup> The parties to the mediation argued that Florida's mediation statute guaranteed confidentiality to the parties—a common provision of most mediation statutes.<sup>153</sup> The judge agreed and denied the motion to open the mediation proceeding.<sup>154</sup> Further, the judge amended his earlier order to no longer require government representatives (only their counsel) to be present, and he suggested that no final settlement needed to be reached at the mediation meeting, thereby obviating the

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settlement conferences. See generally D. M. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center No. FJC-R-86-1, 1986); Menkel-Meadow, *supra* note 6; Wall & Rude, *Judicial Mediation of Settlement Negotiations*, in MEDIATION RESEARCH 190 (K. Kressel & D. Pruitt 1989).

146. See *supra* notes 125-33 and accompanying text.

147. Some of these interests include waste siting, toxic torts, environmental issues, product safety, nuclear power, and civil rights. Adams, *supra* note 1, at 78. A new Florida statute prohibits any court order or agreement that has the purpose of concealing a "public hazard." FLA. STAT. § 69.081 (1990 Supp.).

148. 570 So. 2d 1325 (1990).

149. *Id.* at 1326. The judge relied upon legal authority permitting mandatory mediation in Florida. *Id.*

150. *Id.*

151. FLA. STAT. § 286.011 (1989).

152. *News Press Publishing*, 570 So. 2d at 1326.

153. *Id.* This single case encompasses all of the multiple issues presented by the principal federal cases under discussion here: the issue of mandating settlement processes raised in *Strandell*, the issue of compulsory attendance raised in *Heileman*, and the issue of allowing public access to the settlement proceeding raised in *Cincinnati Gas*. The case illustrates both the blurred boundaries of the law, and the ability of the common law system to generate new situations to test the limits of overlapping and sometimes conflicting legal policies.

154. *News Press Publishing*, 570 So. 2d at 1326.

requirements of the Sunshine Law.<sup>155</sup> Undoubtedly, other state courts will also deal with these issues as the states enact compulsory or optional mediation statutes providing for confidentiality in legal environments. Thus, public disputes, or disputes within or among governments, will likely raise issues about public access to disputing processes that may make it impossible to finesse the conflicting claims as the judge in *News-Press Publishing Co.* was able to do.

### C. *The Constitutionality of ADR*

Public access and first amendment issues are only a few of the constitutional challenges that have been leveled against ADR. Invoking a first amendment claim, both litigants and the public may seek to open settlement processes that were designed to permit confidential and open exploration of options and possibilities for settlement.

I will not pursue in great detail the claims about the constitutionality of ADR because they have been well canvassed by others.<sup>156</sup> As ADR proceeds in its various forms through the courts, advocates have raised issues about violations of the right to jury trial,<sup>157</sup> due process,<sup>158</sup> equal protection,<sup>159</sup> and separation of powers.<sup>160</sup> Most of these claims have failed, and it is clear that with certain protections like nonbinding results, rights to de novo hearings, and limited penalties,<sup>161</sup> ADR can constitutionally be conducted in the courts. Thus, in

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155. *Id.* The appellate court allowed the trial judge's order to stand, holding "that the narrow scope of the mediation proceedings . . . does not give rise to a substantial delegation affecting the decision-making function of any . . . agency . . . to require that this mediation proceeding be open to the public." *Id.* at 1327.

156. See generally Brazil, *supra* note 7; Golann, *supra* note 76.

157. These objections are generally not sustained as long as procedures without juries at common law are not binding and there is a right to a de novo hearing. See, e.g., *Rhea v. Massey-Ferguson*, 767 F.2d 266 (6th Cir. 1985) (holding that a local rule requiring mediation of cases of a certain monetary amount was not a violation of the right to jury trial but simply an additional step between jury demand and trial).

158. This concern is not relevant if alternative procedures are not binding.

159. This concern is apparent in the creation and treatment of different classes of litigation. Michigan, for example, excludes constitutional cases from its mandatory mediation system. Most state and federal courts use dollar amounts to allocate civil cases for mediation or arbitration, whether mandatory, voluntary, binding, or nonbinding.

160. The separation of powers concern involves the misdelegation of judicial functions to others, either non-Article III judges (magistrates), see generally Serron, *Magistrates and the Work of Federal Courts: A New Division of Labor*, 69 JUDICATURE 353 (1986); Silberman, *Judicial Adjuncts Revisited: The Proliferation of the Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989), or lawyers as special masters, see generally Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986), or lawyers in mediation and arbitration schemes.

161. In the constitutional arena, the most successful attacks have been waged against a variety of sanctions and fee shifting attempts to "punish" a litigant who goes to trial after rejecting

the constitutional arena the key issue is how the particular ADR programs are structured. Nonbinding settlement devices have virtually all been sustained against constitutional challenges. Binding procedures, or those that tax too greatly the choice of process (such as cost or fee-shifting penalties), are likely to be more problematic. Constitutional challenges are not likely to eliminate or abolish ADR in the courts, though they may have some role in shaping the particular forms that are used.

More interesting to consider and watch are the myriad of legal claims that will now be developed by adversarial advocates forced to seek peace and settlement. As the use of ADR in the courts increases, cases are beginning to filter up to the appellate courts challenging such things as discovery rights, failure to fully participate, or the use of ADR as a "second chance" on the merits.<sup>162</sup> Other challenges involve rights of confrontation and cross-examination, adequate notice, judicial interference or bias, and lack of neutrality on the part of third party neutrals. Courts will soon have to grapple with the manipulative

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a result from a settlement effort. Michigan's mediation system punishes a plaintiff who fails to do 10% better at trial than in the mediation by three lawyers. *Tiedel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988).

162. For example, see *Dorsey v. Nationwide General Insurance Co.*, No. 102493 (Del. Ch. Sept. 9, 1989) (WESTLAW, Allstates library) in which plaintiff filed an uninsured motorist claim against his insurance company. The defendant Nationwide filed an answer, alleging as an affirmative defense that the claim was subject to mandatory contractual arbitration. *Id.* Two years later, after trial preparation, Nationwide sent plaintiff a notice of intention to arbitrate. *Id.* The court held that Nationwide was estopped from applying the arbitration clause because it had allowed the litigation to go on for two years, thereby benefiting from discovery that it knew was unavailable in arbitration. *Id.* Defendant moved late for arbitration in large part because it was afraid of losing on the merits.

In another case, *Kupstis v. Michaud*, 20 Conn. App. 425, 567 A.2d 1253 (1989), plaintiff brought an action for specific performance of a real estate sales agreement. The case was referred to a referee at the consent of the parties. *Id.* at 1253. The referee took longer than the 120 days required by statute for issuing a report and decision, so plaintiff moved to compel the report. *Id.* at 1254. When the report was unfavorable to the plaintiff, plaintiff appealed, arguing that the trial court had violated his due process rights by accepting a report that was not timely filed. *Id.* The appellate court rejected this argument. *Id.*

In *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989), a creditor was required by statute to participate in debt mediation before going to trial. *Id.* at 398. The creditor's participation at the mediation consisted of an attorney attending and expressing the creditor's hostility to the debtors, mediator, and the mediation process. *Id.* The mediator refused to issue the release for trial, and the court ordered a writ of mandamus stating that participation at one meeting was all the statute required. *Id.* at 399.

In contrast, the federal district court in *In Re Air Crash Disaster at Stapleton Airport*, 720 F. Supp. 1433 (D. Colo. 1988), ordered the parties and counsel in multi-district litigation to attend settlement meetings in the office of plaintiff's counsel. *Id.* at 1435. Further, against defendant's objection, the judge ordered them to bargain in good faith with the possibility of sanctions being ordered for failure to participate. *Id.* at 1438-39. The court relied on its inherent powers to manage litigation and foster settlement under Rule 16 of the Federal Rules of Civil Procedure. *Id.* at 1437.



uses of ADR—scheduling a summary jury trial or arbitration just to hear the other side's case for preparation of rebuttal or simply to inject a little delay into the case.

As advocates have grabbed hold of ADR, they have transformed it into another arena of battle. The interesting question is what are the implications of this "capture" of ADR by the courts and its advocates?

#### IV. THE IMPLICATIONS OF THE LEGALIZATION AND INSTITUTIONALIZATION OF ADR

For those of us who have sought to improve the quality of justice by changing orientations of lawyers and parties about how to solve legal problems, the use of new forms of dispute resolution within the courts has been a mixed blessing. Some of the forms are not so new. Arbitration has been used in court-annexed programs in one form or another since the 1950s.<sup>163</sup> Settlement conferences with judges have been occurring since judges began conducting pretrial conferences under Rule 16 of the Federal Rules of Civil Procedure.<sup>164</sup> Various forms of mediation, neutral case evaluation, and summary jury trials are newer forms which aim to involve the courts in promoting settlement. Another development not reviewed here includes "settlement weeks" in which courts terminate their trial operations for a limited period of time so that all court personnel and volunteer attorneys may devote themselves to facilitating settlement of cases.<sup>165</sup>

The use of settlement activity in the courts should be understood as the clash of two cultures. To the extent that settlement activity seeks to promote consensual agreement through the analysis of the point of view of the other side,<sup>166</sup> it requires some different skills and a very different mind-set from what litigators usually employ.<sup>167</sup> Thus, the

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163. Philadelphia introduced court-referred arbitration in its civil courts in 1952. Hensler, *supra* note 33, at 271. In 1978, after about half of the state court systems experimented with some form of arbitration or similar process, the federal courts began experimenting with arbitration using several districts as demonstration projects. Most arbitration programs attached to courts are nonvoluntary, but not binding.

164. See generally Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Kritzer, *The Judge's Role in Pre-Trial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 34 (1982).

165. This is done in an effort to reduce case backlog. Middleton, *Settlement Weeks Gain Favor Around U.S.*, 9 NAT'L L.J. A-1, cols. 1-2 (Jan. 12, 1987).

166. Other values that are enhanced by good settlement processes and outcomes include information sharing, choices of solutions or remedies that may be beyond what courts would be empowered to order, consideration of the future as well as the past, and resolution of social, economic, psychological, political, moral, and legal issues. See generally Menkel-Meadow, *supra* note 1. Others have also specified these values as being enhanced through the process. See gener-

issue is whether judges and lawyers in the courts can learn to reorient their cultures and behaviors when trying to settle cases or whether those seeking settlement continue to do so from an adversarial perspective.<sup>168</sup> To the extent that we cannot identify different behaviors in each sphere, we may see the corruption of both processes. If one of the purposes of the legal system is to specify legal entitlements from which settlements may be measured, or from which the parties may depart if they so choose, then having adjudicators engage in too much mediative conduct may compromise the ability of judges to engage in both fact-finding and rulemaking.<sup>169</sup> If courts fail to provide sufficient baselines in their judgments, we will have difficulties determining if particular settlements are wise or truly consensual. There is danger in the possibility that good settlement practice will be marred by over-zealous advocacy or by over-zealous desire to close cases that may require either full adjudication or a public hearing.

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ally D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986); R. FISHER & W. URY, *supra* note 21; H. RAIFFA, *supra* note 22; L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987).

167. I use the term "litigator," rather than "trial lawyer," to reflect the fact that most lawyers engaged in litigation spend much more of their time in preparation for trials (depositions, motions, and so forth) than in actual trials, *see generally* McMunigal, *supra* note 7, although I believe that most lawyers' mind-sets when pursuing litigation tactics and strategies are based on the assumptions of trial practice, *see generally* Menkel-Meadow, *supra* note 1.

My own experience with the difference of perspectives required to engage in this function, and the conflicting results, has led me to stop teaching students to be wise negotiators and strong trial advocates at the same time. I think, however, that I was able to do both when I was in practice. I am not alone in this dilemma. *See generally* Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863 (1987). Given these conflicting cultures, some have suggested separate specialties in negotiation and dispute resolution. *See generally* Fisher, *What About Negotiation As A Speciality?*, 69 A.B.A. J. 1221 (1983).

168. Actually, what we really need is more rigorous analysis of actual lawyer behavior, both in the courtroom and in settlement activity. There are very few studies of lawyers actually negotiating; most are based on post-hoc reports of negotiation behavior. *See generally* H. L. ROSS, *SETTLED OUT OF COURT* (2d ed. 1980); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1982); Melli, Erlanger & Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133 (1988). *See also* H. KRITZER, *LET'S MAKE A DEAL: NEGOTIATION OF CIVIL CASES* (1991) (analysis of CLRP data on settlements from court records and attorney interviews); H. GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (1988) (study of insurance and worker's comp negotiations in England); Jonathan Hyman, Rutgers Center for Negotiation and Conflict Resolution, *Study of Lawyer and Judge Civil Settlement Methods*, (Draft Questionnaire, 1990). Most of these studies have found relatively low intensity of activity with conventional, demand-offer, split-the-difference patterns of negotiation.

169. My colleague Stephen Yeazell labels this "market discipline." Under this view, the best that judges can do to promote good settlements is to adjudicate as many cases as possible to make clear the alternative to consensual agreement. In negotiation parlance, judges should make clear what the Best Alternative to a Negotiated Agreement (BATNA) at trial will be. R. FISHER & W. URY, *supra* note 21, at 101-11.

Below I review some of the dilemmas presented by the clash of these cultures—settlement in an adversary culture—and suggest some ideas for consideration and small reforms for adoption. I do not see easy or facile answers to these dilemmas. I do not think we will develop a magic taxonomy of case types<sup>170</sup> that will permit easy allocation of cases to one form of processing or another in part because of the dynamism of the legal system and its actors. Some cases may change in the course of attempted resolution and some lawyers, judges, and parties may develop new ideas and behavioral repertoires during the course of litigation in particular cases.<sup>171</sup> We can continue to monitor the uses to which settlement is put within the court system and to develop some measures, controls, and standards for evaluating whether we are achieving what we want.<sup>172</sup> Innovations in dispute resolution give us an opportunity to explore the limits of our preferences and conceptions about the proper roles of dispute resolvers. At the same time, the use of alternatives to adjudication within the court system raises new issues where the two cultures begin to blur.

#### A. *The "Colonization" of Alternatives by Conventional Advocates*

As Marguerite Millhauser has written, there is an unspoken resistance to alternative dispute resolution<sup>173</sup> that derives in part from the

170. Those types that have been suggested include number of issues, number of parties, amount at issue, public impact of case, need for privacy and secrecy, test case impact, legal versus factual disputes, stage of case, time pressures for resolution and relief sought (adjudication, fact-finding, report, changed behavior required, speed, principled ruling, underlying problems dealt with), relationship desired (on-going, short-term, power imbalances, lawyer-client relations), and process desired (collaborative, advisory, adversary, investigative, fact-finding, predicting court outcome).

In my view, these factors are so numerous and potentially contradictory for each party that any attempt to create a matrix of allocation will likely need at least several dimensions and is not likely to form a predictive model that will suggest in which category a particular case belongs. On the other hand, these attempts at specifying factors may be very helpful for parties to consider as they choose which processes might be desirable in particular cases. See generally C. MENKEL-MEADOW & B. MOULTON, *Who Decides: Lawyer and Client Decisionmaking About Dispute Resolution* in BEYOND THE ADVERSARY MODEL: MATERIALS AND CASES ON NEGOTIATION AND MEDIATION (forthcoming) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

171. This rather optimistic—some would say naive—view is based on my own experience as a litigator, mediator, and teacher. Again, I am not alone in these views. David Luban and Baruch Bush have labeled this view the "transformation" goal of quality dispute resolution. Bush, *supra* note 7, at 1; Luban, *supra* note 7, at 401.

172. I think what we want is enormously problematic. From the literature reviewed in this Article alone, we can see there is little agreement among scholars, judges, and practitioners about what values our legal system is supposed to serve. For some, quick case processing is justice; for others, settlements that do not track the legal entitlements of the parties are not just; and, for still others, legal victories that cannot be enforced are not useful. These are not new value differences among those who aim to create a fair and just legal system. Innovations in dispute resolution have just revived and brought to the fore many of the older disputes about the relationship between procedural and substantive justice.

173. See generally Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3

tendency instilled by our adversarial training<sup>174</sup> to distrust alternative forms of consciousness, such as a focus on solving the problem rather than winning the case. Some of this can be seen in the somewhat conflicting case law developments alluded to above. Some are settlement-promoting,<sup>175</sup> while others are concerned about the limits of forcing settlement and our right to proceed adversarially to trial if we want.<sup>176</sup> But as these cases travel through the courts, it is clear that lawyers are approaching settlement adversarially. They are ready to raise legal, technical, and procedural claims about how cases are being processed, and they are questioning whether settlement comes at the expense of other legal entitlements.

Similarly, there is some evidence that at least some lawyers persist in appearing at various ADR sessions wearing their adversarial suits.<sup>177</sup> A recent professional workshop on alternative dispute resolution was titled "How to 'Win' at ADR."<sup>178</sup> The Michigan courts have "co-opted" the language of ADR by calling their case processing pro-

NEGOTIATION J. 29 (1987); Millhauser, *Gladiators and Conciliators—ADR: A Law Firm Staple*, B. LEADER 20 (Sept.-Oct. 1988).

174. See generally Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487 (1980); Stempel, *All Stressed Up but Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 BROOKLYN L. REV. 165 (1989). See Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93 (1989), for an argument that lawyers have "infected" the labor arbitration process with too many unproductive adversarial formalisms that inhibit the goals of flexible and informal labor arbitration. These formalisms include evidentiary objections, formal procedural rules, and delay. *Id.* at 94-97. See also Bundy & Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation and its Regulation*, 79 CALIF. L. REV. 315 (1991).

175. Examples are the confidentiality ruling in *Cincinnati Gas*, and the ordering of parties to attend mandatory settlement conferences in *Heileman*. See generally Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. LAW & SOC. CHANGE 575 (1986) (criticizing some of the other settlement promoting devices, such as sanctions and penalties for not accepting settlement offers).

176. An example is *Strandell*; see also *Tiedel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988).

177. Suits can, of course, be worn by both male and female attorneys. I raise the issue here, however, to consider whether approaches to case resolution may have some gender component. See generally D. TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990); Menkel-Meadow, *Portia In A Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 32 (1985); Kolb & Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation* (Harvard Law School Program on Negotiation, Working Paper Series No. 88-5, Oct. 1988) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

178. 7 ALTERNATIVES 73 (Apr. 1989). Of course, winning could include "win-win" solutions, but the appeal is to conventional adversarial conceptions of winning at negotiation. For typical examples of how to "win" at negotiation, see generally H. COHEN, *YOU CAN NEGOTIATE ANYTHING* (1982); E. LEVIN, *NEGOTIATING TACTICS: BARGAIN YOUR WAY TO WINNING* (1980); M. MELTSNER & P. SCHRAG, *PUBLIC INTEREST ADVOCACY* 231 (1977). Language use is also instructive. For example, a letter may say "I am filing an ADR *against* you."

gram mediation; in fact, it is a hybrid form of case evaluation and arbitration.<sup>179</sup>

To the extent that "qualitative" ADR consists of an opening of mind and consciousness to formulate a different style or approach to legal representation, the appearance of litigators at mandatory settlement proceedings may taint the quality of the process that ensues. Some firms have gone so far as to recognize that dispute resolution may require different forms of expertise and various personality types. Such firms have developed specialized departments, while others have instituted programs to teach traditional lawyers to conceive of their dispute resolution processes differently. The use of ADR may require some skills other than advocacy.<sup>180</sup> For lawyers and judges who have been taught to argue, criticize, and persuade, rather than to listen, synthesize, and empathize, some changes in behavior will be necessary.<sup>181</sup> Adversarial practices may be problematic in settlement not only because of the obvious risk of stalemate and hostility, but also because extreme positions most often produce unprincipled compromise even if a settlement agreement is reached.<sup>182</sup> This confirms the criticisms of those who see settlement as an unprincipled process.<sup>183</sup> Good settlement practice may be difficult to adapt to traditional adversarial forms.<sup>184</sup>

### B. *The Difficulties of Cross-Dialogue—The Actors*

In an important sense, the ADR movement represents a case study in the difficulties of legal reform when undertaken by different groups within the legal system. At the beginning were the *conceptualizers*—

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179. See generally K. SHUART, *supra* note 33.

180. Some of these skills include different communication skills, the ability to listen, creativity, different forms of analysis and synthesis, and an ability to think outside of legal paradigms.

181. These changes may also be limited by the usual constraints of behavior modification. See generally D. PRUITT, *NEGOTIATION BEHAVIOR* (1982); D. PRUITT & J. RUBIN, *SOCIAL CONFLICT, ESCALATION, STALEMATE AND SETTLEMENT* (1986); J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975); Menkel-Meadow, *Coming of Age: ADR in a Persistent Adversary System*, 1991 NIDR FORUM 11 (Winter); D. Koehler, *Persistence of Conflicting Views* (Stanford Center on Conflict and Negotiation, Working Paper No. 10, May, 1990); R. Robinson, D. Keltner & L. Ross, *Misconstruing the Views of the "Other" Side: Real and Perceived Differences in Three Ideological Conflicts*, (Stanford Center on Conflict and Negotiation, Working Paper No. 18, May, 1990).

182. See generally H. RAIFFA, *supra* note 22.

183. See generally *supra* note 7.

184. Robert Axelrod's work on the iterated Prisoner's Dilemma game is instructive for its possible adaptation to various issues in law practice (discovery strategy, information bargaining, negotiation behavior). R. AXELROD, *THE EVOLUTION OF COOPERATION* 28 (1984). The most robust program in repeat plays was "TIT FOR TAT." *Id.* at 31. This program was "nice, retaliatory, forgiving and clear." *Id.* at 54. Thus, good settlement involves both firmness, analytic acuity, some altruism and reciprocity, at least in repeat plays.

academics<sup>185</sup> and judicial activists<sup>186</sup> who developed both the critique of the adversary system and, in some cases, the design of alternative systems of dispute resolution. The *implementers* developed the concrete forms these innovations took when they moved into the legal system. Some of the *conceptualizers*—Frank Sander and several of the judges—were also *implementers*. In addition, other judges and judicial administrators principally concerned about case load management, and about the quality of solutions or decisions, became *implementers*. Support for the implementation of these ADR programs came from the principal foundation and government funding sources,<sup>187</sup> as well as from groups of change-oriented practicing lawyers who played an important catalytic role in supporting and using some of the first alternative procedures.<sup>188</sup>

Finally, the *constituents* of these ADR systems—lawyers and their clients as consumers—were “acted upon,” sometimes somewhat consensually, by the force of court rules or judicial encouragement. We are just beginning to see some of their reactions in the litigation developing from ADR innovation and in evaluation research.<sup>189</sup>

185. In many respects, Frank Sander's article, *The Varieties of Dispute Processing*, initiated many of the alternative dispute resolution innovations within courts. See generally Sander, *supra* note 7. One such innovation is the “multi-door courthouse” idea, which contemplates a choice of dispute resolution processes for litigants who reach the courthouse doors. *Id.* at 130-31. This concept is currently being tested in several jurisdictions. See generally S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 2. While he was in practice, Eric Green was one of the conceptualizers of the mini-trial. See generally Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493 (1978). Steven Goldberg, a labor arbitrator, publicized the hybrid form of “med-arb” (mediation-arbitration) in some dispute processing. See generally Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract*, 77 NW. U.L. REV. 270 (1982). See also R. FISHER & W. URY, *supra* note 21; McGovern, *Toward A Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Riskin, *supra* note 7.

186. Examples of these judicial activists include Judge Thomas Lambros of the Northern District of Ohio, see generally Lambros, *supra* note 61, Judge Robert Peckham of the Northern District of California, see generally Peckham, *The Federal Judge As Case Manager: The New Role in Guiding A Case From Filing to Disposition*, 69 CALIF. L. REV. 770 (1981), Judge Richard Enslen of the Western District of Michigan, see generally Enslen, *Michigan Mediation*, in ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (E. Fine ed. 1987), and Magistrate Wayne Brazil of the Northern District of California (former law professor at Hastings College of Law), see generally Brazil, *supra* note 1; Brazil, *supra* note 7. For a discussion of the early neutral evaluation program in Judge Peckham's court, see generally Brazil, *supra* note 7.

187. These sources include NIDR, CPR, and the State Justice Institute.

188. The lawyers in this group include, among others, Robert S. Banks, Vice President and General Counsel at Xerox; Robert Gorske, Vice President and General Counsel at Wisconsin Electric & Power; Charles Renfrew, General Counsel at Chevron; Kenneth Feinberg of Kaye, Scholer, Fierman & Hays; Ronald Olson, of Munger, Tolles & Rickerhauser; Walter Kocher, Vice-President and General Counsel at Borden Company. See generally DONOVAN, LEISURE, NEWTON & IRVINE ADR PRACTICE BOOK (J. Wilkinson ed. 1990).

189. See generally E.A. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLER, J. RESNIK & T. TYLER, *supra* note 33; Esser, *supra* note 7.

Each of these groups of actors within the ADR legal reform movement inhabit different cultural worlds—academia, the judiciary, law practice, the business world, and everyday life. Each group uses, transforms, and “colonizes” the work of the others. The research of academics is ignored or simplified; judges move cases along and adopt the language of case management rather than justice; lawyers “infect” clients with a desire for adversarial advantage, or in other cases clients do the same to lawyers; and professionals argue about credentialing and standards for the new profession.<sup>190</sup>

Each of these actors in the dispute resolution arena may be serving different masters. As the ideas are institutionalized, they develop into new and different forms of dealing with problems.<sup>191</sup> Those who work in the field have attempted to create environments for dialogues among and between these constituencies.<sup>192</sup> Some of these meetings have been productive and have fostered “cross-class” understanding. Just as often, however, such meetings leave people confirmed in their views that their particular paradigm is most accurate. Others do not understand the particular reality that some may face—whether it be the crush of caseloads or the lack of “justice” in settlements.

In my view, productive discourse about ADR will have to transcend the language of these cultural differences. Academics, and particularly those who theorize about jurisprudential concerns, need to root their views in the practicalities of our empirical world.<sup>193</sup> Occasionally, judges and legal practitioners need to step back and review the larger jurisprudential and policy issues implicated in “quick-fix” reforms. Practitioners and clients need to consider new forms of practice and process while diminishing their adversarial ways of thinking. A professional life should be one of re-examination, growth, and change. If

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190. See generally Society of Professionals in Dispute Resolution Commission on Qualifications, Issues Paper (Sept. 1988) (unpublished draft) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

191. For example, the summary jury trial in the courts is a hybrid of the mini-trial, which was first developed for private dispute resolution. Mediation in the private sector has been adopted in court settlement usage and is mandated by statute for some forms of action. See, e.g., CAL. CIV. CODE § 4607 (West Supp. 1990) (mandating child custody mediation).

192. For example, the Wisconsin Institute for Legal Studies Disputes Processing Research Program sponsored a conference on the quality of dispute resolution which brought these constituencies together. The “academic” outcomes of this conference are published in *Quality of Dispute Resolution*, *supra* note 7. The Center for Public Resources’ annual meetings often use panels designed to foster such “cross-class” dialogue, and conferences sponsored by NIDR and SPIDR also attempt to bring together theoreticians, researchers, practitioners, and judicial officers.

193. For my views about the importance of empirical study in legal scholarship, see generally Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. U.L. REV. 91 (1990).

we are really looking for new ways to process disputes—both to increase case-processing efficiency and to promote better quality solutions—then we have to be willing to look critically at the innovations and their effects from all quarters. I believe that social innovation and transformation are possible here—the issues are whether conventional mind-sets will “infect” these innovations on the one hand, or whether the “cure” will be worse than the disease on the other.

### *C. Issues, Proposals, and Reforms for Innovation and Evaluation of ADR in the Courts*

In a sense, we are at a second stage in the development of alternative dispute resolution innovations. The bloom on the rose has faded as some experiments have been tried and now present their own problems or dilemmas. Some of us still aim for consciousness transformation and creative solutions to problems; others are more focused on the institutionalized forms of ADR and what can be done to make them work. Many of the issues raised by these developments require policy judgments for which we have an inadequate empirical data base; others require us to make normative choices based on what we value in a procedural system. If ADR is to meet the basic levels of fairness, then the following questions must be addressed, and the following data must be collected to prevent ADR from becoming totally swallowed by the adversarial system:

1. To what extent will courts lose their legitimacy as courts if too many other forms of case-processing are performed within their walls?<sup>194</sup> If the “other” processes are not considered legitimate within public institutions, they will be legally challenged and transformed so that they will no longer be “alternatives,” but only watered-down versions of court adjudication. These watered-down versions may be violative of the legal rights and rules our courts are intended to safeguard. Are theorists, practitioners, and citizens capable of changing our views of what courts should do?<sup>195</sup>

2. Should some case types be excluded from alternative treatment?<sup>196</sup>

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194. Our conception of the court as the central dispute-resolver is socially constructed and culturally based. As Martin Shapiro has argued, one can see courts as performing a specialized form of dispute resolution where adjudication is seen as a sub-category of mediation. See generally M. SHAPIRO, *supra* note 10.

195. Courts have always done more than “adjudication.” See generally Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438 (1981).

196. For example, some commentators suggest that *Strandell* stands alone in its condemnation of the summary jury trial because it was a civil rights case with a potential power imbalance



3. What are the purposes for using particular forms of alternative dispute resolution? Caseload management and docket reduction may suggest entirely different processes than a search for a better quality solution<sup>197</sup> which might be quite costly and time-consuming. If the goals and purposes of particular ADR institutions are clarified now, future problems based on overly abstract goals may be avoided.

4. What forms of ADR should be institutionalized? Not all ADR devices are the same. There is a tendency in the literature and in the rhetoric to homogenize widely different approaches to dispute resolution. A more thorough and careful consideration of each of the devices might lead to different conclusions about the utility and legitimacy of these devices. Mandatory settlement conferences, for example, may become quite acceptable if the judicial officer attending the conference will not also be ruling on the evidence at trial.<sup>198</sup> Similarly, we might feel differently about summary jury trials if they were as accessible to the public as any other activity conducted in open court and if jurors were told about what they were doing. These distinctions implicate all of the legal policy issues in drafting the rules of procedure. How much regulation of each process should there be? How clear should the rules be before parties can elect different processes or before they can be "ordered" to attend? How should Rules 16, 39, 68, and 83 of the Federal Rules of Civil Procedure be read or amended to reflect the changes in settlement policy?<sup>199</sup> What values should these rules serve? By what standards should practices under these rules be evaluated?<sup>200</sup>

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in legal resources. I am, however, skeptical of such efforts. When there are identified victims who need recompense, even some civil rights actions may be appropriate for settlement. But we may have to allow one or both of the parties to opt out of a process if court adjudication is desired by them. Thus, I am in favor of mandatory processes that require litigants to try a settlement process, but I would permit easy exit.

The irony of *Strandell* is that the plaintiff's possession of the names and statements of the witnesses provided plaintiff with a legal advantage. The difficult question posed by *Strandell* is whether the correction of legal resource imbalance with the better advocacy by the plaintiff's lawyer should be preserved until trial. I have trouble with this notion because our discovery system is intended to put an end to some modern forms of trial by surprise.

197. When mandatory child custody mediations average only three or four hours, or can be resolved in just a few sessions, we may question whether a "quality" solution is being produced.

198. We know from the empirical work of Wayne Brazil that mandatory settlement conferences, when conducted appropriately, are highly desired by many attorneys. Brazil, *Settling Civil Cases: What Lawyers Want From Judges*, 23 JUDGE'S J. 14, 16 (Summer 1984).

199. See generally Guill & Slavin, *supra* note 7. This raises the difficult question of whether the rules should structure these innovations in advance, or whether flexible rules should permit wide experimentation for rule modification after experience and evaluation.

200. By "standards," I mean both social science standards for evaluating efficiency and efficacy and legal standards such as "abuse of discretion" in the use of a particular practice.

5. What are the politics of ADR? Does ADR serve the interests of particular groups? This is not an easy question to answer. Many have argued that "minor" disputes have been siphoned out of the public legal system, while "major" disputes have continued to receive the benefits of the traditional court system.<sup>201</sup> Large corporations are also removing their cases from the court system. Through their increased use of private ADR, the economics of dispute resolution are more subtle. Some may be "forced" out while others choose to opt out. What will this mean for payment and subsidies of dispute resolution? Will "free market" forces decide the fate of ADR? Who will control decision-making about ADR—judges, lawyers, clients, or legislators? If those with the largest stake in the system exit, who will supply the impetus and resources for court and rule reform? At the level of institutional decision-making, are these issues for individual judges, for the Congress, or for the United States Supreme Court to decide?<sup>202</sup>

6. What are the cultural forces producing these legal changes at these particular times? Has the larger culture around us changed since particular legal innovations were adopted? If attempts to incorporate party participation in disputing were made in the "participatory" 1960s and 1970s, then does the 1980s era of privatization of public services dictate other considerations in the use of ADR? How has the rhetoric of quality justice been transformed into a rhetoric of quantity and case processing?<sup>203</sup>

7. How are different forms of ADR actually functioning? This is the evaluation question. We need to know more about how these processes actually work<sup>204</sup> in terms of processes used<sup>205</sup> and outcomes

201. The distinction between "major" and "minor" disputes has generally been defined in monetary terms.

202. Other than in its recent cases supporting arbitration, *see, e.g.,* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Court held that predispute arbitration agreements are valid for claims under the Securities Exchange Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Court upheld an agreement to arbitrate even though the claims were antitrust claims), the United States Supreme Court has yet to rule on any of the relatively new innovations of ADR in the courts. *See also* a recent Supreme Court ruling that age discrimination claims could be subjected to compulsory arbitration, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

203. These questions require rigorous study by anthropologists of legal culture.

204. Some current studies, including Marie Provine's study of judicial settlement techniques, will provide rigorous quantitative and qualitative empirical analyses of how these various forms of ADR are being used. In the socio-legal framework, studies of ADR practices are part of an ongoing research project on the transformation of disputing in our society. *See generally* Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 2 Mo. J. DISPUTE RESOLUTION 25 (1985); special issue on *Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 611 (1980-81).

205. Some of these processes include adversarial attitudes, coordination and collaboration, information exchanges, and power imbalances.

achieved,<sup>206</sup> as well as the more common measures of party satisfaction.<sup>207</sup>

In my view, alternative dispute resolution and the pursuit of settlement in the courts will, and should, continue. The courts will deal with these issues as they experiment with different formats and as they continue to rule on the legal issues presented by ADR. In order for ADR to develop in a way that enhances our trust in the American legal system, several important reforms should accompany our experimentation.

First, some forms of ADR should remain mandatory, but not binding. At first blush, it is easier to suggest that ADR should be used only consensually<sup>208</sup> to preserve the kind of settlement culture that is motivated to reach voluntary and consensual agreement without the "taint" of coercion and unproductive adversarialness. But in my own experience as both a mediator and a litigator, I have seen many good settlements emerge through the skilled intervention or facilitation of the parties by skilled negotiators or third parties, even in cases where settlement seemed impossible. I still believe in the "transformation" and education project attributed to me by Baruch Bush and David Luban.<sup>209</sup> In addition, in order to rigorously evaluate some of these alternative processes, we will have to study them as they are used on a wide variety of cases without choices about opting in or out.

Second, if some settlement processes are to be made mandatory, certain essential legal protections may have to flow from those processes. If they do not, then processes may have to be chosen consensually or voluntarily. I would recommend records of proceedings—stenographic proceedings of both summary jury trials and mandatory settlement conferences—in order to provide a record for appeals or challenges for "coercive settlement" conduct. Such coercion would violate legal standards of abuse of judicial discretion for those settlement practices involving judicial officers. I would still preserve the confidentiality of some forms of settlement to facilitate candor. Records should be available to parties in the event of challenges as

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206. In an ideal scientific world, we would be able to compare the outcomes of different processes in the same case. Our legal system cannot financially or constitutionally afford to create perfect experimental conditions with real cases, so we will have to rely on studies that come as close as possible. See generally E.A. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLER, J. RESNIK & T. TYLER, *supra* note 33; McEwen & Maiman, *supra* note 33.

207. We may need to be more methodologically creative, borrowing such systems as peer review from medical service evaluation.

208. This was my original position.

209. Bush, *Defining Standards of Quality in Dispute Resolution: Setting the Stage for Discussion*, 66 DEN. U.L. REV. 336, 379 n.85 (1989); Luban, *supra* note 7, at 413 n.88.

judges may be called upon to rule about whether particular hearings should be conducted *in camera* or opened to the public and whether documents should be sealed.<sup>210</sup> In all other settlement processes, like arbitration or mediation led by attorneys, decisions should be non-binding with right of trial *de novo* to protect the parties' constitutional rights, and to provide an alternative to an inappropriate arbitration process.

Third, if settlement processes are to be conducted within the courts, they should be facilitated by those who will not be the ultimate triers of fact. Because I believe that good settlement practice frequently depends on the revelation of facts that would be inadmissible in court,<sup>211</sup> the facilitator of settlement cannot be the same person who will ultimately find facts or decide the outcome of the case. In some courts this will mean the use of magistrates, and in others it will mean rotating judges through cases on other dockets.

Fourth, settlement facilitators must be trained to conduct settlement proceedings, particularly those that depart from conventional adjudication models.<sup>212</sup> In its current format, the summary jury trial operates much like a regular trial. Therefore, it requires few skills different from those we assume judges currently possess.<sup>213</sup> Because it uses mediation techniques, a settlement conference draws on other skills and therefore requires specialized training.<sup>214</sup>

Fifth, we must provide the evidence for systematic evaluation of alternative dispute resolution devices. To accomplish this goal, I recommend the recording of proceedings, as well as more sophisticated data collection at the court level. With the advent of computer technology, it should be possible to create data sets of case treatments that would permit the kind of systematic analysis necessary to compare outcomes and processes of greater variety and in greater depth. These data sets could be supplemented by qualitative research, including party satisfaction measures.<sup>215</sup>

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210. This of course implicates the growing body of law in testing the limits of statutorily protected confidentiality in mediation proceedings. See N. ROGERS & C. MCEWEN, *supra* note 78, at 95-146; See also Cheh, Civil Lawsuits as Dispute Resolution or Public Regulation (draft paper prepared for Rutgers Center For Negotiation and Conflict Resolutions, Feb. 27, 1991).

211. By this I do not mean only those items which would be inadmissible because of evidentiary objections, but also those facts that go to the parties' underlying needs, interests, or objectives that would be totally irrelevant to the legal proceedings. If such facts were presented to the fact-finder, they might prejudice rulings on evidentiary matters, or even about the final outcome.

212. This point is also related to point number three.

213. Although there usually are no evidentiary rulings made in the summary jury trial, it operates much like an adversarial presentation with opening and closing statements by the lawyers.

214. This is a view I advance in Menkel-Meadow, *supra* note 6, at 513-14.

215. See generally the data collection in D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT (1983).

Sixth, different forms of ADR should be unbundled and separately evaluated. Summary jury trials may work best in fact-intensive cases, or in cases likely to take a great deal of trial time. Evaluation and consideration of the advantages and disadvantages of summary jury trial can be distinguished from the pros and cons of mandatory settlement conferences, and from early neutral evaluation and other case management devices. We must be more precise about what we call "alternative" and what we label "adjudication." Both of these concepts have become so abstract, undifferentiated, and homogeneous that we no longer know what is being measured against what. "Shadow verdicts" may not be the same as "shadow bargains,"<sup>216</sup> and in order to evaluate these processes, we need to understand the baseline comparisons. It might be instructive to determine how important it is to parties, as well as scholars, that settlements track legal entitlements.<sup>217</sup>

Finally, categorical judgments about particular processes are likely to be unhelpful. Mediation or summary jury trials *per se* do not violate our procedural rules or jurisprudential norms. More often, the issue is whether a particular process is carried out sensitively or "coercively." Because of the range of human variation in how these proceedings are conducted, it makes more sense *at this point* to allow judicial experimentation and legal challenges to be handled in each case.<sup>218</sup> Standards, like abuse of discretion, should protect against the abuses of those who do not adequately protect the parties' rights to fair process.<sup>219</sup> Furthermore, the amendment process to the Federal Rules of Civil Procedure provides another opportunity for regulation.

I offer these simple suggestions to encourage the flowering of alternatives to expensive and limited court adjudication, while at the same time seeking to preserve that which characterizes the good in both ad-

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216. Luban, *supra* note 7, at 387.

217. This point may also be very important for scholars. The role of law in negotiation and mediation is a complex issue. This is true both in terms of normative views—whether law and its underlying principles should govern the resolution of disputes—and its empirical reality. See generally Cooper-Alexander, *supra* note 37. See also G. FRIEDMAN, *THE ROLE OF LAW IN MEDIATION* 286, 298-99 (Center for the Development of Mediation Law 1983). Legal entitlements are judgments made by legislators and judges about what rules should govern human conduct in individual cases and in the aggregate. The issue of when parties should be able to consent to departures from the law involves both micro-interpersonal level decision-making and macro-level compliance.

218. This ability to determine each case on its merits represents the strength of our common law system.

219. Of course, the adoption of a case-by-case abuse of discretion standard may burden those who cannot afford to appeal. Because a decision about the ADR process may need to be resolved early, it may be uncorrectable as well as outcome determinative. Therefore, it should be appealable through writs or interlocutory appeals.

judication and settlement. Both authoritative rulings and consensual agreements have their place in our dispute resolution system. These should be monitored and managed so that they preserve what is good about each without "infecting" the other. I am as unhappy with "coerced compromises" as settlements as I am with limited adversarial solutions to polycentric problems.<sup>220</sup>

## V. CONCLUSION: WHITHER GOEST ADR?

Obviously, I am not happy with all of the developments and turns that ADR has taken. By opposing its mandatory, court-institutionalized forms, I find myself in an awkward position—considered by some to be an unmitigated apologist for ADR,<sup>221</sup> and by others to be downright hostile to ADR. For me, many of the institutionalized structures may be useful in encouraging those deeply entrenched in a particular way of thought to try something new. But my fear is that we may be pouring old wine (and whines!) into new jugs. Commitment to the kind of sensitive, caring, and quality (Pareto-efficient) solutions that I seek comes from intellect, insight, commitment, and some volunteerism. While I think it is an open question whether mandatory programs can serve an educational function for those who are totally ignorant about these new processes, I still think that a certain consciousness is necessary for the achievement of quality solutions. Thus, I am somewhat skeptical of some of the ways in which mandatory programs force people to use other processes of dispute resolution that may be subject to distortion within the adversary culture in which they are placed. This should be a time of experimentation, both in the public and private sectors. It seems to be somewhat ironic that the courts are moving into a period of rigid rule making to structure the very processes that were designed to transform the judicial system into one more flexible and responsive to the needs of its constituents.

As a teacher of negotiation and methods of dispute resolution, I am now faced with the task of teaching "the law of ADR," as well as contributing to the creativity of the negotiation process. I continue to teach my students to be fish swimming upstream in the river of our adversarial culture because I believe not all problems should have binary or compromised solutions. I still seek dispute resolution processes that are designed to solve problems, not make them worse.<sup>222</sup> As

220. See generally Menkel-Meadow, *supra* note 1.

221. Silbey & Sarat, *supra* note 7, at 484-96.

222. Just as the medical system can sometimes make illness worse (iatrogenic illness), the legal system can make our problems worse ("juridogenic" problems). See C. SMART, *FEMINISM AND THE POWER OF LAW* 12 (1989).

a law and society legal realist, however, I see that we must understand that our innovations do not occur in a vacuum—they are enfolded into an already existing legal culture. The questions that have brought me here today<sup>223</sup> are why the adversary culture is as pervasive as it is in our legal culture and whether any radical transformation is possible. All social innovation will have its unintended consequences. The consequences may simply be to see the force of the adversary system as it pulls against its correctives. If I seem unable to take a definite stand on one side of the adjudication versus settlement debate, it is because I am a mediator. In the end, truth is almost always found on both sides. The key is not to compromise, but to work toward a principled and fair resolution of the issues.

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223. I feel somewhat victimized by the forces I describe, as some distort my own arguments and claims about alternative ways of resolving disputes while at the same time seeking to defend adjudicative processes. Silbey and Sarat suggest that my model of problem-solving negotiation emphasizes "needs," not "rights." Silbey & Sarat, *supra* note 7, at 484-96. *But see* Menkel-Meadow, *supra* note 1, at 838-40. Catharine MacKinnon sees negotiation as unfeminist for failing to see that women will lose in negotiations with more powerful men. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 74 (1985). *But see* Menkel-Meadow, *supra* note 1, at 833-36. Resnik suggests that alternative modes of dispute resolution are overly therapeutic or psychological for resolution of legal issues. Resnik, *supra* note 3, at 497. *But see* Menkel-Meadow, *supra* note 1, at 829-40. The structure of these arguments shows just how forcefully adversarial, rhetorical styles cause us to see things as "either/or," rather than to appreciate the complexity and richness of multi-faceted problems and issues. These may require more complicated solutions than the "either/or" we seek in the conventional adjudicatory mode or through adversarial argument.